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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 199

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BEN B. JACKSON, BY HIS GUARDIAN AD LITEM, ALPHENE W. DOWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 7, 1937
CERTIORARI GRANTED OCTOBER 11, 1937

26861—37

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TRANSCRIPT OF RECORD

CAPTION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.
AT LAW.

At a District Court of the United States for the Eastern District of South Carolina, begun and held at the Court House in the City of Charleston, S. C., on the third Monday in January, being the twentieth day of the same month, in the year of our Lord one thousand nine hundred and thirty-six.

Present: Honorable Frank K. Myers, United States District Judge for the Eastern District of South Carolina.

Among other were the following proceedings:

COMPLAINT.

(2) Filed October 14, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

Ben B. Jackson, by his Guardian Alphene W. Dowell, Plaintiff,

vs.

The United States of America, Defendant.

The plaintiff respectfully shows to the Court and alleges:

1. That heretofore, to-wit: on the 27th day of April, 1918, Jake Jackson of Jasper County, South Carolina, the father of Ben B. Jackson, a minor, was drafted in the Army of the United States and served in said army until he died on the 11th day of May, 1918.

2. Plaintiff further alleges that at the time of the death of Jake Jackson on the 11th day of May, 1918, he had only one child, to-wit: Ben B. Jackson, who was born on the 10th day of August, 1917, in Jasper County, South Carolina.

3. That on the 29th day of June, 1935, Alphene W. Dowell was duly appointed Guardian for the said Ben B. Jackson by the Probate Court of Jasper County, State of South Carolina, and is now engaged in the discharge of his duties as such, said appointment and jurisdiction being within the Eastern District of the said State.

4. Plaintiff further alleges that One Hundred, Twenty (120) days had not yet expired between the date of entrance in the United States Army by the said Jake Jackson and the date of his death, and that on account of the death of the said Jake Jackson, his son, Ben B. Jackson, is entitled to automatic insurance according to (3) the Acts of Congress, and regulations pertaining thereto, in the sum of Twenty Five ($25.00) Dollars per month from the date of death of the said veteran until Two Hundred, Forty (240) installments of said automatic insurance has been paid.

5. Plaintiff is informed and believes that on account of the matters hereinabove stated that the United States of America is due and owing to him the sum of Twenty Five ($25.00) Dollars per month from the 11th day of May, 1918, the date of death of said veteran, to date, no part of which has been paid and an additional payment of Twenty Five ($25.00) Dollars per month until Two Hundred, Forty (240) installments have been paid in accordance with the terms of contract of automatic war risk insurance, and regulations pertaining thereto.

6. That a disagreement exists between the plaintiff and the Veterans Administration as to payment of said contract of automatic war risk insurance.

7. That the Veterans Administration having declined to pay plaintiff's claim, it became necessary for him to employ attorneys to bring this action for the collection of said claim, and said attorneys are entitled to a reasonable fee for their services.

Wherefore: Plaintiff prays judgment against the United States of America.

First, for the sum of Twenty Five ($25.00) Dollars per month to the plaintiff from the 11th day of May, 1918, to date.

Second, for adjudication of his right to future payments of Twenty-Five ($25.00) Dollars per month according with the terms of said contract of automatic war risk insurance until Two Hundred, Forty (240) installments have been paid.

Third, for a reasonable fee to be fixed for attorneys for the prosecution of this action.

(4) Fourth, for the costs of this action, and for such other and further relief as this court may deem just in the premises.

R. K. WISE,
ANDERSON G. ULMER,
Attorneys for Plaintiff.

(Complaint verified.)

ANSWER.

(5) ● Filed Nov. 26, 1935.

The defendant, answering the complaint herein, respectfully shows to the Court:

FOR A FIRST DEFENSE.

1. That it denies each and every allegation of the complaint not hereinafter specifically admitted, explained or modified.

2. That the defendant has not sufficient information to form a belief as to the truth of the allegations of Paragraph 3 of the complaint herein.

3. The defendant admits so much of the complaint as alleges that Jake Jackson was drafted into the United

States Army on April 27, 1918, and that he died on May 11, 1918, without having applied for War Risk Insurance, and the defendant specifically denies Ben B. Jackson is a child of the said Jake Jackson, deceased, and therefore defendant alleges that insurance is not payable, as alleged in said complaint.

FOR A SECOND DEFENSE.

The defendant respectfully shows to the Court that suit was not brought in this case within the time prescribed by law and the same is therefore barred by the limitations contained within the Acts of Congress relative to War Risk and automatic insurance.

(6) Wherefore, the defendant demands that the complaint be dismissed with costs.

CLAUD N. SAPP,
United States Attorney.
ROBERT E. WILSON,
Attorney, Dept. of Justice.
Attorneys for defendant.

November 20, 1935.

(Answer verified.)

ORDER OF JUDGMENT.

(7) Filed July 3, 1936.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

Ben B. Jackson, by his Guardian, Alphene W. Dowell, Plaintiff,

vs.

The United States of America, Defendant.

This cause came on regularly to be heard on January 29, 1936; Anderson G. Ulmer and R. K. Wise appearing for the plaintiff; Honorable S. H. Edmunds, Assistant United States Attorney for the Eastern District of South Carolina, and Robert E. Wilson, Esq., Attorney for the

Department of Justice, attorneys for defendant; that a jury of twelve persons was regularly impaneled and sworn to try the said cause. Witnesses on the part of plaintiff and defendant were sworn and examined with reference to the action herein upon a suit on automatic war risk insurance on the life of Jake Jackson, a soldier of the World War, providing that in the event of death before application for insurance was filed, and that said death occurred within One Hundred, Twenty (120) days after entrance into service that the defendant would pay to a permitted class the sum of Twenty Five ($25.00) Dollars per month, until Two Hundred, Forty (240) installments had been made; that after hearing the evidence and the instructions of the Court the jury retired to consider of their verdict, and subsequently returned into Court their verdict in words and figures as follows, to-wit:

"We the Jury find for the plaintiff.

"Dated: January 29, 1936.

(s) C. M. THOMPSON, Foreman."

(8) And the Court having fixed plaintiff's attorneys' fees in the amount of ten per centum of the insurance sued upon and involved in this action. Therefore, on motion of R. K. Wise, attorney for paintiff:

IT IS ORDERED, ADJUDGED, AND DECREED that Ben B. Jackson, the plaintiff, have judgment against the defendant and to have and recover of the United States of America, the defendant, installments of the insurance sued upon in the sum of Twenty Five ($25.00) Dollars per month beginning May 11, 1918, up to and including January 11, 1936, the monthly anniversary date immediately *preceeding* the trial of said cause of action.

AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the defendant, The United States of America, deduct Ten per centum (10%) of the amount of insurance sued upon and involved in this action and pay the same to Anderson G. Ulmer and R. K. Wise, plaintiff's attorneys, for their services rendered before this court, payable at the rate of one-tenth (1/10th) of

all back payments and one-tenth (1/10) of all future payments which may hereafter become due on account of said insurance, said fee to be divided as follows: Five (5%) per cent to Anderson G. Ulmer, Savannah, Georgia, and Five (5%) per cent to R. K. Wise, Columbia, South Carolina, said amounts to be paid by the defendant to the said Anderson G. Ulmer and R. K. Wise out of any payments to be made to Alphene W. Dowell, Guardian of Ben B. Jackson, his successors or assigns.

FRANK K. MYERS,
United States District Judge.

July 3, 1936.

Approved as to Form.

CLAUD N. SAPP,
United States Attorney,
For the Defendant.
By ROBERT E. WILSON,
Attorney representing
Department of Justice.

BILL OF EXCEPTIONS.

(9) Filed July 20, 1936.

Be it remembered that at a stated term of the United States Court held at Charleston, South Carolina, on the 29th day of January, in the year of our Lord one thousand nine hundred and thirty-six, the above entitled case came on to be heard, at which time the Plaintiff appeared by his counsel, R. K. Wise, Esq., and A. W. Dowell, Esq., and the Defendant by its counsel, S. Henry Edmunds, Jr., Esq., Assistant United States Attorney, and Robert E. Wilson, Esq., Attorney of the Department of Justice. A jury was duly empanelled and the following proceedings then were had:

The Complaint and Answer were read. Defendant's counsel moved that the witnesses be segregated and examined separately. Motion granted. Ruling also applied to Government's witnesses.

Thereupon the Plaintiff, to sustain the issues upon his part, offered the following evidence, to-wit: A. W.
(10) DOWELL was called by counsel for the plaintiff, and being duly sworn, testified:

DIRECT EXAMINATION.

By A. W. DOWELL:

I practice law in Savannah, Georgia. I am a member of the Savannah Bar. It appears from the record in this case that I was appointed guardian of Ben Jackson in 1932 by the Probate Court. That is the Court of Ordinary, which corresponds to the Probate Court of South Carolina. While I was acting in a capacity of guardian in that court, I interceded in behalf of the minor child in regard to the automatic insurance. Every form requested by the Veterans Administration was furnished. I was then assured upon some $6,000.00 with the American Surety Company and sent that to the Government in 1932. I never received this money. If I might be allowed to state why I didn't receive the money, the reason for their declining payment of it. I had letters—

The COURT: You declined to receive or pay it? A. No, sir. I first received notice of the award by letters from the government, stating it was 240 monthly installments due my ward, and requesting that I furnish affidavits and surety bond. I complied with that, and it was held up for some little time. The next thing I received from the Government was a letter stating that under the Act of March 1st, 1933, just to close my files on it, that that Act passed had wiped out all claims that hadn't been paid or litigation hadn't been started in court up to that time. I closed my files on it until I read in the papers of the Supreme Court decision. I don't recall the exact decision which held that the automatic insurance which was due my ward did not come
(11) under the heading of war risk insurance, that it was not a gratuity but was the same as war risk insurance, and the act didn't affect it. I then made demand to the Veterans Administration again, and they stated that the administration apparently from their investigation should not have been in Chatham County but should have been in Jasper County, South Carolina. After

some considerable delay, I then obtained letters of guardianship in Jasper County.

That is where the child lives. I sent the guardianship papers to Washington then. They declined payment. There were several features to the case. I received several letters, but this is the final letter denying the claim. The date of this letter is September 4th, 1935. I took that letter to mean that they were not going to pay me. On October 14th I filed suit as guardian in this court. I think that date is correct. After I received that last letter this is all the correspondence that I have had in reference to it. I have just taken it out of my file.

(Letter file offered in evidence and marked Plaintiff's Exhibit No. 1.)

I had a hearing in the Probate Court in Jasper County. That hearing was on July 22nd, 1935. I had witnesses there to give testimony. I had relatives of the family. At this hearing these witnesses were sworn in by the Probate Judge, Judge McCormick, and examined: Tom Polite, Maria Drake, Mary Clarke, Millie Battice, Minus Wright, and James Chisholm. And this is what Judge McCormick found after hearing these witnesses—

(12) *The Court: That is not competent.*

Q. You took these witnesses over? A. Yes.

CROSS EXAMINATION.

By Mr. WILSON:

Q. Mr. Dowell, you were appointed by the Probate Court of Jasper County as guardian for this boy on the 29th day of June 1935? I believe that is the date. A. That is what Judge McCormick gave me.

Mr. WILSON: I would like to offer in evidence letters of guardianship, showing that June 29th, 1935, as the date of apopintment.

(Letters of guardianship received in evidence and marked Exhibit 2 by Defendant.)

Q. Now, Mr. Dowell, the war risk insurance act as amended on July 3rd, 1930, and which is the act under which these suits are now brought, provided that a claim is a writing which alleges permanent total disability at a time the contract was in force. (Showing witness letter.) When you use these words, showing an intention to claim the benefits, the insurance benefits. Now, sir, since your appointment, what letter have you written them demanding the payment of this insurance? A. I wrote them sending them the certified copy.

Q. What demand in writng have you made since your appointment as guardian? A. I would like to answer that question in this manner: The original claim was filed in 1932 under an appointment—not under this later appointment in Ridgeland, South Carolina, but over in Chatham County.

Q. Which was a void appointment. A. It was never thrashed out. I just tried to comply with the require-
(13) ments of the Veterans Administration. They said administration should have been had in Jasper County, South Carolina, and I therefore applied for letters in Jasper County.

Q. You don't appear here as guardian in Chatham County? A. The Veterans Administration wanted it in Jasper County.

Q. You don't claim any rights in this court under the appointment in Chatham County? A. No, sir.

Q. If you are claiming rights under this appointment in Jasper County, I want to know where is your demand since you were appointed in Jasper County? A. Under date of October 26th, 1932.

Q. That is before. That is prior to your appointment, and I object to that.

The COURT: Have you made any written demand for the payment of this insurance since your appointment as guardian by the Probate Court of Jasper County? I don't intimate that that stops this suit, but that is the question asked you.

Q. Under date of July 24th, 1935. This is a letter that I wrote. I will read this.

"Veterans Administration, Washington, D. C. *In re*: Jake Jackson, XC 16-485. Gentlemen: With fur-

ther reference to correspondence of December 4th, 1933, and March 22nd, 1934, having reference to claims for automatic insurance and death benefits filed by me as Guardian of Ben B. Jackson, wherein you advised that my previous appointment as guardian of this child and the order of the Ordinary of Chatham County, establishing the veteran Jake Jackson as the putative father of the minor Ben B. Jackson were void because the minor Ben B. Jackson was a resident of Jasper County, South Carolina, and the Ordinary of Chatham County was, therefore, without jurisdiction in said matters, beg to hand you herewith certificate of guardianship issued to me by the Probate Judge of Jasper County, South Carolina, and certified copy of Order and Decree (14) of the Judge of Probate of Jasper County, South Carolina, establishing the said veteran Jake Jackson to be the putative father of my said minor ward, Ben B. Jackson. As you will notice a purely nominal guardianship bond in the sum of $100.00 has been given in this case, but upon advice of any award made in favor of the said Ben B. Jackson, bond with recognized surety company in the sum sufficient to meet all legal requirements will be given. From previous correspondence with the administration it appears that an award was made in the matter of the automatic insurance and that the reason for holding this up was the question of jurisdiction. Since the contention of the Administration has been that the courts of South Carolina had jurisdiction in this matter, and since the proceedings herewith referred to have been had in the Probate Court of Jasper County, South Carolina, where the said Ben B. Jackson was born, has resided most of the time, and is now living, I request that these claims be given consideration in the light of the enclosures, and that if it is necessary that official blanks in support of these claims be executed by me at this time, that same be forwarded for execution. Trusting that these matters will have your prompt attention, I am Yours very truly, Alphene W. Dowell, Guardian of Ben B. Jackson, Minor."

I received a reply to that letter. In rely to that I received this letter:

(Reading) "Dear Sir: Receipt is acknowledged of your communication dated July 24th, 1935, enclosing

certified copy of the order of the Probate Court of Jasper County, South Carolina, dated July 22nd, 1935, declaring Jake Jackson, the above named veteran to be the putative father of Ben B. Jackson, minor, also certified copy of letters of guardianship in the matter of your appointment as legal guardian of Ben B. Jackson, issued by the Probate Court of Jasper County under date of June 29th, 1935. Please be advised that your claim for automatic insurance as legal guardian of the above named minor is receiving the attention of this office, and you will be further informed with reference to this claim in due course of business."

There is another supplement under date of September 4th, 1935, which states:

"Supplementing letter from this office addressed to you under date of August 1st, 1935, you are advised that decision has been rendered in this case that Grace Beeton is not the common law wife of Jake Jackson, and that Order entered by the Probate Court of Jasper County, South Carolina, decreeing Jake Jackson the putative father of Ben B. Jackson, is entitled to no weight in the adjudication of this case due to the fact that a judgment decreeing the putative father of the children must be entered during the lifetime of the putative father. (15) Furthermore, that the action to establish paternity of an illigitimate child is essentially an action *in personam* and not an action *in rem*, and the death of the party who would be the defendant abates any such proceeding even if instituted prior to the death of the defendant. Therefore, the claim of Ben B. Jackson for automatic insurance in this case as child of the above named soldier has been disallowed."

So that is what I rely on as to demand and refusal for the payment of the insurance. And on authority of those letters I brought this action. I know nothing personally about the family. As to relationship only from my investigation. All I know is hearsay, nothing of my own knowledge. My first client was Jessie Jackson, a brother of the dead soldier. He brought the claim to me. I have the letter here. I don't recall when that was. It was in May, I think. Either April or May. This is a letter I wrote the Veterans Administration on be-

half of the brothers and sisters on May 28th, 1932. At any rate, in the Spring of 1932.

RE-DIRECT EXAMINATION.

By Mr. WISE:

Upon my investigation in this matter as Attorney and Guardian in this case I ascertained the date that this child was born as near as possible. This is the child here that I am guardian of. That is him. Ben B. Jackson.

TOM POLITE was called by Counsel for the Plaintiff, and being duly sworn, testified:

DIRECT EXAMINATION.

By Mr. WISE:

I live in Ridgeland, South Carolina. Jasper County. My last birthday I done 49. I born 1887. I work, you (16) may say, call it railroad. I totes mail, take care of baggage, and look after passengers for Atlantic Coast Line in the Town of Ridgeland. I start on that job the 15th of January, 20 years ago. I knew Jake Jackson all my days. We all raised right on one plantation. That plantation was 2 miles and 6/10th from Ridgeland where my house sat,—all the community, all us there. I live right there now. I have been living there all my life right there, from there to Ridgeland, up and down the road. Jake Jackson lived from me during that time about the length of 5 acres, his house from my own, straight. Jake was colored. I knew Grace Beeton. I knew her all her days. I live around about—Jake Jackson's house is between my house and her own, and Jake live about 5 acres from Grace's house—about the length of 10 acres. About 10 acres from Grace's house. I see Jake all the time during the time he got large enough to work. I carried him with me on the railroad. He was flagman for the boss on the bridge gang. He worked for Mr. Walter Gilmore on the bridge gang. He needed a flagman and I carried him out there and he been flagman out there until he put him to work, and I see him all the time because I was the one carried him out there. I was the one who got the job for him. He continued to work for the Coast Line until he went in the Army. So far as

I know of. He took a trip to Brunswick to see his brother and while he was there they all stand examination for the Army. He stood the examination at Brunswick and they carried him from Brunswick, Ga. Any-
(17) way, he went in the Army. During this time that we were working for the railroad we all sleep in shanty cars during the week, and on Saturday night the captain would give me a gang pass to carry the mens home. He lets 6 go this Saturday and 6 the next, and by me being the head colored man, the pass come in my name. That give me a chance to go every Saturday.

Q. You were the head man down there. A. Yes, sir, and I tell who I wanted to go this time, and I left some stay two weeks on the job. The fellows I like I carry every Saturday.

In other words, the ones I didn't like, I didn't take them. Those fellows that wouldn't work and were stubborn on the job make me mad, and I left them. During this period of time that Jake Jackson was working with the Coast Line, as to where Jake Jackson lived and spent the nights and who he was with, I will tell you this: he go to his sister's house and put his luggage down and go on to Grace house, and sometime he tell me when it is time to go back—we go back on the train, on No. 80 to Drayton Hall—and he tell me that if he don't wake up I must come by Grace's house and wake him up. I went sometimes and wake him up and we catch a car and come on down. It was over five years or more that I would go to Grace's house to get him, because I work on the bridge gang seven years, and I carried him two years after I been there. About five years. During that time that he was staying with Grace, at Grace's house, two children were born to Grace. The first child's name was Alice, a little girl. That child lived about 6 months.
(18) Upon the death of Alice, Grace had another child. That child was named Ben. That is the same fellow there, Ben. I call him minor. These little fellows grow fast now, but this boy ain't no more than 17 or 18. This child was born in 1917, in August, but I don't know the date of the month, but he was born in August, 1917. I stated that during a period of five years or more, while Jake was working with the railroad, I was bringing him backwards and forward, and I stated that if I liked the

boy I would bring him in every week, and if I didn't like him, he would get to come in every two weeks. I am not in a position to state whether Jake came in every week. I will tell you how I work that. The boss give me orders and tell me what to do. Mr. Gilmore tell me what to do. So the fellows that act mulish and give me back tongue and wouldn't do what I tell them, I left them in the car Saturday night. He walked off and don't go back to work unless he wants to. Many time Jake stay home a week or two weeks and catch me on the next time. There was never a time that I stayed home for a week at a time. I never stay. I never sick. I never take a drop of doctor's medicine. There would be a hundred and three days before I lose one. I was home every Saturday and every Sunday, and I would go back on Monday morning. I was home for two nights out of every week, during all this period. Every time I wanted Jake I could find him with Grace. Grace stayed in her own house. Grace had a house of her own. Her mother dead and left the house there and Grace (19) stayed in the house by she was the only single girl. Grace's mother owned this house and Grace stayed there. That boy is staying in the same house right now. This little boy was born in that house. He born right in the same house. It need fixing now though. As to the reputation and the general knowledge in that community as to who Jake lived with during this period of time—he was living with Grace. It looked to me like they been man and wife because he don't try to hide it. Sometimes he take the little fellow and carry him to meeting. He take the boy in his hand and tote him and go to meeting and go on back. I had to tote my old lady's own. It was generally known in the community that Jake Jackson was the father of this child. During this period of time, as far as I know, Jake supported and maintained Grace, because Capt. Gilmore used to sell groceries on the cab cars to the men who worked for him, and when he come home Jake buy groceries from the commissary like, and carry them for Grace while Grace sick with that child, and sometimes he leave money because he borrow money from me to leave there. When this first child Alice was born, I know of my own knowledge Jake continued to go to that house and take groceries to Grace. He was doing it all the time. After the first little girl was born, when Grace became an expectant mother again

he stayed right on as far as I know. I have to carry the little sack to my house. I don't have but a short while home and I spent most of my time home. I never (20) saw any other man go with Grace during this period of time that Jake was staying at her house. Not them little while I been home. Not on Saturday and Sunday. If they go they go in the nights when I ain't see 'em.

CROSS EXAMINATION.

By Mr. WILSON:

This boy's mother's name is Grace Beeton. She is dead now. She died—I figure on about four years. She died in 1932, I think. Grace mother named Jane Beeton. Grace had several children. I think she had one before she had that little girl. His name was Henry Beeton, and after this boy was born here, Grace had some more children. One name Katie Beeton, the next one, next to that boy there. She was born after Jake died. So she wasn't Jake's child. Not that I know of. Jake was already dead. Jake didn't go to the Army from down there at our place. He went to Brunswick. He got in Brunswick two weeks before he went to the Army. He went to see his brother. His brother was sick. When Jake died, he died in the Army, and while he was sick there in the Army he told the Army people that his nearest kin was Agnes Jackson. Jake's sister. She lived down there at Ridgeland. Agnes was Jake's sister and lived at Ridgeland. If he told those people in the Army that, he told them right. When Jake died I believe they sent the telegram to Agnes that he was dead. I wasn't home. I knew it at the time and wanted to know what to do with the body, and they brought him (21) back to Agnes' house. And buried him right there at Agnes' house, who was his sister. Grace was living then. She was living right there where she had been all the time. He could have easily told them in the Army that Grace was his wife and the telegram been sent to Grace just like it was to Agnes. They lived about five acres apart, right there in the same place—community. We have got a little town there, Mitchellville and Agnes and Grace both lived at Mitchellville. Grace never married. Not that I know of. She was never considered a married woman, she was no more than

Grace Beeton. If she married, Grace Beeton would go by some other name. And she never did do that. I call it Grace's house. Jake is the only person I see there the little while I been home. I only been home Saturday nights and Sundays. The other time I am on the job. Jake stayed there Saturday and Sunday night, as far as I know of.

Q. But Jake never claimed he was married at all. He was a single man. A. That is what he looked to me. I ain't never heard of no wedding. Some colored people ain't particular with no wedding no how.

Q. He didn't claim Grace was his wife, did he? A. He claim he was going with her.

Q. I understand that. No doubt about that. But he didn't claim she was his wife, did he? A. I reckon he did.

Q. Now don't you know he didn't? A. I believe he claim her as his wife in this way, but they ain't had no wedding or preacher or nothing like that.

(22) Q. But he didn't claim Grace was his wife, did he? A. Yes, sir, in a way.

Q. You never heard him say "Grace Beeton is my wife", did you? A. No, sir, only he talk about going to his girl's house.

Q. Did you ever hear her say Jake was her husband? A. She call him fellow.

Q. And that was the relation you knew they maintained, not husband and wife, but they were living together. Is that right? A. Yes, sir. I am going to tell the truth as far as I know about it.

Q. Every now and again in the last 8 or 10 years, or 4 or 5 years, somebody representing the government would come to you about this thing, and you always told them just like you told here today, that while you knew they lived together, they didn't claim to be man and wife. A. As far as I know of, that is the way I know it.

RE-DIRECT EXAMINATION.

By Mr. WISE:

When Henry Beeton was born I don't think Jake was going with Grace. Henry was the first child born as far as I know of. And so far as I know, Jake was not going with her at that time. Katie Beeton was born

after Jake's death. I couldn't tell how long after Jake died it was when Katie was born. Katie is not much over 14 years old, between 13 and 14. It must have been four or five years after Jake's death when Katie (23) was born. Whether Agnes Jackson is here in court I couldn't tell. They have got some of them upstairs. I couldn't tell whether she is here or not. That little Jackson girl, Bessie, is not here. I know she is not here because she is sick. I know Maria Drake. She is a sister to Grace. Jake's brother that been to Brunswick was named Peter Jackson. That is his oldest brother. I said that Peter was sick, when Jake went down to see him. Jake went down to see him one time as I know of. The same time he gone in the Army. He never did come back until he come back dead. I directly couldn't tell you how long he had been gone before he was drafted in the Army. I don't know when he was drafted or when he went in the Army, because that is a long ways from me, over a hundred or more miles. This boy at the time when he went there couldn't have been over a year old or 6 months, something like that. Jake didn't went to stay, but he got out of a job. He went out there, and when his brother get some better he get a job and work some. Jake did not work continuously with the Atlantic Coast Line until he went to Brunswick to see his brother. Not regular. When he was on the job he lost his job. Then he worked some on the section gang. That is how come he got fired. He trusted to work on the trestle force. He lost his job on the trestle force, then he went to the section force, but he didn't stay there. He did not work with the railroad up until the time he went down to Brunswick to see his brother. He didn't have a job all the time. We worked 6 regular men on the sec-
(24) tion force. The last work he did at Ridgeland was with the Atlantic Coast Line section force, not with the trestle force, but section force. That is he kept those government tracks in good shape so the trains could run.

RE-CROSS EXAMINATION.

By Mr. WILSON:

Grace's mother and my mother were sisters, and Jake's mother and my mother were sisters. I was first

cousin to Jake and first cousin to Grace, and Grace and Jake were first cousins.

MARIA DRAKE was called by Counsel for the plaintiff, and, being duly sworn, testified:

DIRECT EXAMINATION.

By Mr. WISE:

I live in Ridgeland. Two miles out of Ridgeland. I am a sister of Grace Beeton, oldest sister. I knew Jake Jackson all my days. When he born we live just about an acre apart. I have lived all my life in one settlement. All my life in that little community of Mitchellville. During the time that Jake was living in this settlement I was living right there, living in my own home. I was married at that time. I have children. My sister Grace was living right there by me, in her own house. *He* come into that house by her mother, after *he* mother died. She just continued to *say* in the house. Grace is dead. *He* died about—near four years ago. Jake Jackson is a little kin to me, first cousin. I know about Jake working for the railroad. As near as I could realize he worked for the railroad about five or six years, as I know (25) of. I couldn't tell you who he was working under. The head colored man was Tom Polite. The man here. During this time, that he was working with the railroad he lived right there with my sister Grace. While he was living there children were born. The first one was Alice. Alice is dead. Alice lived after she was born as near as I could realize about three months. She lived about three months. During that time that Alice was born, and before she was born, and during the time right after she was born, Jake continued to stay at the house with Grace. It was generally known who was the father of that little girl, Alice. He said so and my sister said so. He took care of him. Another little boy came along, Ben Jackson, but his name is Ben B. Jackson. That is Ben all right. He take care of him until he went to the war, yes, sir. Because I give him money myself to take care of my sister. Because I waited on my sister—because she was with that boy. I nurse her and buy for her. About the little girl Alice—I was with her then. Yes, sir, right there. Jackson before he leave to go off to the Army did not go some other place first.

He leave her house that morning, he leave from Grace house that morning. He say he was going to War. He leave that morning and say he was going to war. He was working with Tom Polite—I couldn't tell where he was working at, but he was working, because when they carry him home he leave Grace house that morning and tell her he was going to the war. During that period of time that Grace and Jackson were living together in this house, I have estimated it was around five or six (26) years. I never seen a one there but he. No man been there but him.

Q. What was the general reputation in the community as to who was the father and mother of Alice? A. Jake Jackson and Grace Beeton.

Q. What was the general reputation as to who was the father and mother of the little boy Ben? A. Jake Jackson and Grace Beeton.

Q. Was it generally known and the reputation in that community? A. Yes, sir, among all the people.

Q. Was it general reputation and known in that community that Jake and your sister Grace lived together? A. As man and wife. That is all I know. They lived together as man and wife.

Q. They stayed together? A. They stayed right there together.

Q. For how long a period now did they stay together there, you say, as man and wife,—for how long a period? A. Five or six years as near as I could get at it. That is, that I know of.

I don't know if Jake had a brother down in Georgia. I knew a boy named Peter Jackson. Peter and Jake were brothers. Peter was my first cousin, too. That is about as near kin as you can get. I don't know anything about my first cousin Jake going down to see Peter. Peter went off as a small boy. I don't know much about him. He went off as a small boy to Georgia. I don't know very much about Peter. I never hear anything about Jake being down to Peter's. I can read and write (27) just a little. When they brought Jake back from the Army he was buried to our cemetery, a place call Burton graveyard. Right in the community of Mitchellville, right next to Okatee Club.

CROSS EXAMINATION.

By Mr. WILSON:

Ridgeland is the County seat right there by me, the Courthouse is right there at Ridgeland. I live right close, two miles from it. I don't know the Board that caught Jake and sent him to the Army. I don't understand you. I don't know the Board that used to catch the boys and send them to the Army. I never knew that they would go to the Courthouse and register and tell all they knew. I never go no where hardly. I never knew until he come back there that morning and tell Sister Grace he was going. He leave from Mitchellville —what I mean from Grace house. That very day that he went to the Army he left right there. That is my story.

Q. Well, when he died there in the Army they sent a telegram to his sister Alice telling about it, didn't they? A. Yes, sir.

Q. Telling her that he was dead? A. To his sister Alice?

Q. Yes. A. He ain't got no sister named Alice.

Q. Maybe it was Agnes. A. They didn't send it to his sister Agnes because she was a little girl.

Q. You mean Jake's sister Agnes was a little girl? A. Yes, sir.

(28) Q. When he was in the Army? A. Agnes, yes, sir, she was little. They might have sent it to his sister Mary.

Q. How old was Agnes? A. I couldn't tell you.

Q. How old is she now? A. I couldn't tell.

Q. But about how old? A. I just can't estimate how old she is because I never did find out about the age.

Q. Is she 40 years old? A. No, sir, she ain't 40, a long ways from 40, because me myself I got a girl older than she is.

Q. How old is your girl? A. My girl is 23 years old.

Q. And is older than Agnes? A. Yes, sir, she is older than Agnes.

Q. Did Jake have any sisters younger than Agnes? A. Yes, sir, he got a sister younger than Agnes.

Q. She must have been just a little girl. A. A small little girl.

Q. So if Jake claimed he had some dependent sisters to look after, Agnes and—what is the other named? A. Agnes and Bessie.

Q. She was a little girl, too? A. Small.

Q. Well now, if Jake wanted to stay out of the Army to look after his sisters, he must have had to look out for those little girls. A. I don't understand what you mean.

(29) Q. When he told them when he was drafted that he had to look after and support somebody, that must have been who he was talking about? A. He left his child to take care of.

Q. That doesn't answer my question. I say, those two sisters were little girls, Bessie and Agnes, they were little girls. A. Small.

Q. And his father and mother were dead. A. His father wasn't dead. I don't know if his father was dead. It has slipped my memory. He might have. I know his mother was dead.

Q. His father was, too, wasn't he? A. I couldn't realize whether his father was dead or not.

Q. You just don't remember? A. I just don't remember.

RE-DIRECT EXAMINATION.

By Mr. WISE:

Ben is somewhere around 18 years old. I know that. I know he is not 21.

MINUS WRIGHT was called by Counsel for the Plaintiff, and, being duly sworn, testified:

DIRECT EXAMINATION.

I live in the section of Mitchellville, close to Ridgeland. I work for the CWA now. I been working with the Coast Line. I worked with the Coast Line years ago. I knew Jake Jackson. I been knowing Jake the best portion of my days. We were partly raised up together. (30) During the time that Jake worked for the Atlantic Coast Line on the section gang and bridge gang, I was working for the Coast Line then. I spent the

nights out in the shanty cars and came home on Saturdays and Sundays. During this period of time, Jake lived with this woman he call Grace. I knew Grace. I knew Grace, as near as I could come to it, from about 8 years old until she become a grown woman. She is dead. During this period of time, about whether or not Grace had any children born to her while Jake was living with her, one I knew of and I heard of the other one. One I knew of, this same boy Ben, but of course the other one born I don't know, but connect it up going backwards and forward. I don't know about the other. I saw Jake with this child and with his mother, because me and him went to the same house to see two sisters. Each one went to see one of the sisters. There was two sisters in the house. Jake was going with one and I with the other. I was going with Maria, the one that just testified. The two houses were together. Here was one and the other was there—just about 50 yards apart. They were all in the same yard, only two houses. Grace was living in her own house. It was her mother's house. I was going with Maria. When Jake went there, he would spend the night over there. Jake been knocking around there for nearly—something over two years. Me and him been traveling back and forward. So he got this girl in a pregnant condition and they wanted him to marry. He asked me to marry too but I slip in and out, but they hold him in there to marry. Grace held him. She hold him to marry her and she say when he did (31) marry she was going to put him to law. That ease me out, because I didn't want to get married. I leave, but I slip in at night and when daylight come, I am gone.

Q. Well, do you know whether Jake was ever married to Grace? A. I know about the marriage. I couldn't prove up about the marriage, but he always claim about his wife, but I didn't press to prove it. Because I slip in and I been close enough to know he was there, because I hear him talking. Because I and him go there from the job. During this period of time when Grace was expecting a child Jake didn't leave that community. He stayed right there. He tote him bags of rations. When he tired, I help him carry it. I told that boy "You just as well be married, because you paying off just the same. You just as well get married". In other words, Jake

furnished food there and stayed there in the house. He claimed he bought clothes for this little boy. He had the luggage in the packages. I didn't search it, but he claim he had everything the poor woman needed.

Q. What was the general reputation in that little community as to the father and mother of this child, and with whom Jake lived? A. They expected Jake like he was living as that girl's husband.

Q. That was the reputation in the community, that they lived together as man and wife? A. Yes, sir, they didn't hide it.

CROSS EXAMINATION.

(32) By Mr. WILSON:

Q. So you thought he just as well be married? A. Yes, sir.

Plaintiff rests.

Mr. WILSON: Your Honor, we would like to move for a non-suit. I think this case clearly fails to come within the provisions of the law, your Honor. While it is true there is no question of what relation was maintained between Jake Jackson and Grace Beeton, which was in many respects exactly similar to that of husband and wife; yet they didn't claim to be husband and wife. There is not a single word of testimony in the record that either claimed the other as wife or husband. Tom Polite said very definitely that they did not, that she never claimed him as her husband. She said he was her "fellow". He never claimed her as his wife. She was his woman. And that your Honor, under the South Carolina law does not make husband and wife. That does not make common law marriage. They must hold themselves out to the world to be husband and wife, as I remember the law on it. They must not merely maintain the relationship similar to that of husband and wife, but they must hold themselves out to be husband and wife; and when they do not make any such claims, their relationship is not established. I think that is the rule that has come down from the old English law and has never been changed or questioned so far as I know.

(33) The COURT: There is no question about the law. The Court conceives it as absolutely correct.

Mr. WILSON: There is not a single line of testimony that they claimed to be husband and wife. Not a witness has said so.

The COURT: I am not very clear about that. I thought the testimony from the last two witnesses was that they did.

Mr. WILSON: Like husband and wife? I listened very carefully for that statement as I thought it was coming from these witnesses.

(The Court asks the stenographer for a transcript of the testimony of the last two witnesses on that particular question insofar as it shows what the community's idea of the relationship was, and what their own idea was.

(Recess.)

Mr. WILSON: If your Honor pleases, I think we can save a little time if your Honor will allow me to withdraw my motion for a non-suit and introduce certain records and move for a directed verdict.

(Withdrawal of motion for non-suit granted.)

Mr. WILSON: I desire to introduce, your Honor, the A. G. O. records in this case and to call particular at-
(34) tention of the Court and Jury to the questionaire of the veteran, which is dated December 24th, 1917, and which was signed at Tarboro, in Camden County, Georgia, in which the veteran made claim for exemption from the draft on the ground that he should have been placed in Class 3, Section C, which is a man with dependent helpless brothers and sisters, and his answer to the following question: Q. Do you claim exemption or deferred classification in respect of the registered name above, if so, state the division of each class and each class in which you claim you should be classified. A. Yes. in division C, Class 3. Signed Jake Jackson by his mark.

The other classification, your Honor, provides for a man with a wife, child or children, and no claim was made except for exemption in Class 3, division C, which is the dependent brothers and sisters.

The clinical record at the hospital in which the

veteran was confined immediately after his entry into the service: Name, Jake Jackson. Rank, Private, Company 56. Regiment or Staff *Crops*, 157, depot bridge. Age, 34 years. Service, years 5/365th, which would indicate he had been in the Army 5 days. Birthplace, South Carolina. Station, Camp, Gordon, Georgia. Date of admission in the hospital, May 14th, 1918. Source of admission, 157 depot Brigade, Religion, none. Home address, born in South Carolina. Name and address of the nearest relative, sister; Agnes Jackson, Ridgeland, South Carolina.

(35) I offer that as Defendant's exhibit No. 2.

Now, if your Honor please, I offer in evidence a letter dated July 19th, 1918, a copy of a letter which has come from the file of this veteran, dated July 19th, 1918, and addressed to Mrs. Agnes Jackson, Ridgeland, South Carolina. "Dear Madan—

Mr. WISE: I believe we certainly would be entitled to look at that letter. We might want to interpose an objection before it is read.

Mr. WISE: We object to this letter going in and our ground of objection is that this letter was addressed to Agnes Jackson, who is a sister of the soldier, and a letter that was written by her, a statement made by her, the same girl. She is not a party to this suit, and we object to the letter going in under any circumstances whatsoever unless it could be some evidence produced here as to why Agnes Jackson is not in Court. That hasn't been gone into, and it is a matter of common knowledge that when any one dies while in the service, why the brothers and sisters and everyone else, if it was possible for them to do so, all of them came in to claim to be the dependent. We do not think it is competent in this case, and has no bearing as to it.

Mr. WILSON: Your Honor will note this is a letter directed to Agnes Jackson, who was designated by the soldier as his nearest relative, suggesting that she file a claim for any benefits that might be due, and her reply as to the family relationship of the veteran.

(36) Mr. WISE: Agnes Jackson is in this Courthouse here.

The COURT: I don't think it is admissible at this time, Mr. Wilson.

Mr. WILSON: Will your Honor allow me to argue this just a moment? This is a letter from the Govern-

ment officials charged with the duty of looking after the dependents of soldiers, written very shortly after death to the person that he designated as his nearest relative. They write here suggesting that there might be certain claims and benefits due, and specifically ask her to fill out Form 501, which she does and returns, before there was any question of insurance. As a matter of fact, at that time there was no such thing as automatic insurance, that Act granting automatic insurance being passed, I believe, in 1921, and that is her reply, an official reply to an official request by the Government relative to the family status of this man. It seems to me that it should be admitted. Certainly it was a statement, the first statement coming after the death of the man from a member of his family, and the one designated as his nearest relative. We think it is admissible.

Mr. WISE: Your Honor, please—

The COURT: You need not argue. In my opinion it is not admissible on several grounds.

(Exception noted by Mr. Wilson.)

(37) Mr. WILSON: That is the Government's case, your Honor.

Mr. WISE: We have something in reply since the AGO record has been put in evidence.

IN REPLY FOR PLAINTIFF.

AGNES JACKSON GADSDEN was called by Counsel for the Plaintiff, and, being duly sworn, testified:

DIRECT EXAMINATION.

By Mr. WISE:

My last name is Gadsden. I am married. My name before I was married was Jackson, and it is Gadsden now. In other words, I was Agnes Jackson. I had a brother in the World War. He was named Jake Jackson. I live in Ridgeland. When my brother died I was not sent a telegram advising of his death. I was small. I ain't know nothing about it. When he died I been small, about that high (illustrating). I been small. I know what a telegram is. I don't remember about getting a telegram about my brother dying. No, sir, I can't re-

member. I been too small to remember. I in my 21 right now. I don't know how old I was when my brother went in the war. I been too small to remember. I had older sisters. Mary Clark. *He* the one raise us. That is an older sister. I have another one. Her name is Bessie Jackson. I ain't got no more, no more sisters than Mary Clark and Bessie. I older than Bessie, but Mary Clark *he* older than all of us, because *he* the one take care of (38) us. That is my sister. She is the one that took care of me and Jake and Bessie. At the time my brother Jake went in the Army, she was in Mitchellville. I ain't remember who took charge of the funeral when my brother was brought home. I been too small.

CROSS EXAMINATION.

By Mr. WILSON:

I in my 22. I am not but 22 years old. I don't remember when my brother went off in the Army and came back there and was buried. I was too small.

Q. Well, you know your brother wasn't married, don't you? A. No, sir, I ain't know nothing, whether he been married or not.

Q. You don't know he was not married? A. No, sir, I been too small to know anything.

Q. Well, you know now he wasn't married, don't you? A. No, sir, yes, sir.

Q. Which do you mean? A. No, sir.

The COURT: What do you mean?

Q. You don't know he never married Grace Beeton? A. No, sir, I don't know.

Q. You don't know he never claimed to be married to Grace Beeton? A. No, sir.

Q. You don't know anything at all about it? A. No, sir, I don't know. I been too small. Grace Beeton die. (39) Q. Two or three years ago. You knew Grace Beeton, didn't you? A. Yes, sir.

Q. What name did she go by now? A. Grace Beeton.

Q. And ever since you were a little child, you knew Grace Beeton as Grace Beeton? A. Yes, sir, that is all I know.

Q. You never heard of her being called Grace Jackson? A. No, sir.

Q. She was Grace Beeton till she died? A. Yes, sir.

Q. She wasn't Jake Jackson's widow, was she? A. No, sir, I don't know.

Q. You knew her as Grace Beeton? A. Yes, sir.

Q. Are you married? A. Yes, sir.

Q. That is how come you call yourself Grace Gadsden instead of Grace Jackson, is it not? A. I Agnes Gadsden.

Q. Your husband is named Gadsden? A. Yes, sir.

Q. And if Grace had a husband she would go by the name of her husband, too, wouldn't she? She would go by Jackson? A. Yes, sir.

The COURT: That might depend on whether she was married or not.

Q. How long have you been married? A. 6 years now.

RE-DIRECT EXAMINATION.

(40) I know what a nephew is. I recognize Ben as my nephew. That my nephew.

The COURT: I would simply call attention to the fact which has developed, Mr. Wilson, bearing upon my ruling on the admissibility of the paper offered in evidence by the Government. It now appears to be absolutely certain that Agnes Jackson never made any such report.

MOTION FOR DIRECTED VERDICT.

Mr. WILSON: If the testimony is true, your Honor. The Government desires to move for a directed verdict upon three grounds. First, that there is no legal disagreement. Second, that the action is barred by the statute of limitations, having been brought more than six years after the cause of action arose, as provided in the Act of July 3rd, 1930, and more than three years after the appointment of a guardian. The Act provides, if your Honor will recall, that suit may be brought by an insane person or other persons under disability at any

time within three years after the removal of the disability. Now, the guardian in this case, according to his own testimony, was appointed, I forget the exact date, but early in 1932, more than three years before this action was brought. We think the action is barred by the statute of limitations. And upon the third ground that there is no substantial evidence that there was a common law marriage between Jake Jackson, the alleged father of the plaintiff, and Grace Beeton, the mother of the plaintiff.

(41) (The Court refuses the motion for a directed verdict, and submits the case to the jury.)

(Exception noted and allowed to the overruling of the motion for a directed verdict.)

Mr. EDMUNDS: We would like to make a request to charge, which isn't entirely consistent with the law applied by your Honor in refusing the motion for a directed verdict. We conceive the law to be that there can be no establishment of a common law marriage without the full knowledge of the parties. Your Honor intimated in the ruling that perhaps the parties had committed certain acts which would as a matter of law compel the Court to say that they were married by the common law.

The COURT: No, you misunderstood me. It is not established by acts unless those acts are continuous and create the reputation in the community.

Mr. EDMUNDS: May I point this out: That the reputation in the community is secondary evidence as to marriage or no marriage. The primary evidence is the testimony of the parties to the status or the contract, whichever you might call it. If a man comes into Court and says, "Yes, we were marired and considered ourselves married. We had an agreement to that effect. We weren't going through any formal steps to bring it about, but we said we were going to be man and wife and raise our family." Then their reputation in the community could not possibly affect that testimony. That would be conclusive in fact. But the reputation only comes in when the parties are dead. My understanding of the books is (42) that there can be no common law marriage except through the consent and knowledge of the parties to the marital contract, and I have got to call it a contract for

the purposes here, although in the late decisions some judges say it is a status and others say it is a contract. In the Della Torre case here in Charleston that question came up then and was discussed, and they call it one or the other. Some refer to it as a status and others as a contract, but at any rate to this extent it is a contract, that there must be an agreement, a meeting of the minds of the two parties that they will live together as man and wife. Nothing could possibly make them man and wife unless they themselves thought they were and intended to be. So I think the primary evidence in the case is evidence coming from one of the parties, which we have in this case in those records. It isn't positive evidence because the man didn't say, "I have no wife or child". But it is evidence that he had no wife and no child.

The COURT: I will charge them on that.

Mr. EDMUNDS: The request we want to make is that they could not be husband and wife by virtue of the common law rule unless they themselves agreed to be. That that is absolutely essential in any marriage whether formal or informal. The elements of a contract of marriage are no different in the common law than when they step before an officer capable of giving an oath. The elements are the same. In common law the elements must be the same. They must accept each other as man and wife.

(43) The COURT: Is there any question between Counsel as to the right of the pjlaintiff to recover if it should be established that the ward is the legitimate child of the veteran?

Mr. WILSON: In the event it is established?

The COURT: Whether there is any question between Counsel under the provisions of the Act that the plaintiff can only recover for his ward if it is established that the ward is the legitimate child of the veteran?

Mr. WILSON: There is no question on that. It is also admitted that he wasn't in the service as long as 120 days.

CHARGE TO THE JURY.

Gentlemen of the Jury, the claim in this case as set out in the complaint is based upon an Act of Congress, and without going into detail the provisions of the Act, I charge you that the plaintiff is entitled to recover for the benefit of his ward if it be established to the satisfaction of the Jury first, that the ward is the legitimate child of the alleged deceased veteran Jake Jackson.

This Court realizes, as perhaps has already been intimated to you, the difficulties under which the jury will have to reach their conclusion on the issue presented to them. In discussing before you some of the motions and testimony in this case and commenting on it, some stress has been made upon the marriage status as be-
(44) tween persons of color. That necessarily followed the showing that the claimant was a colored boy, and that his parents were colored people. You also heard some discussion of a comparatively ancient statute, and of the marriage relations or cohabitations between slaves during the pre-civil war period, as a result of which it became necessary for the legislature of South Carolina to pass an act defining the legal and civil status of the children of such unions.

In passing the act defining the status of the children of the relation between slaves, the legislative body provided that children of such marriages should be deemed legitimate, provided that they should not be deemed to extend to persons who have agreed to live in common convention after their emancipation. I think you understand as to what the effect of that status was then.

After that time and prior to that time, before, both with relation to free whites and free negroes, the law provided that people were married people, people who lived together were married people when their declarations or conduct was such that the community was justified, the community in which they lived, in classing them as married people, as a result either of their conduct or declaration. That, of course, established the law of inheritance, and also established the law of legitimacy of off-springs.

I charge you that in the present instance, knowing that you will give exactly the same consideration to this question in this case with relation to this plaintiff, the

ward of the plaintiff, exactly the same honest consider-
(45) ation that a jury of reasonable, unprejudiced, high minded South Carolinians would give to the same state of facts in any case involving a question of the legitimacy of a child, whether high or low, white or colored, that you must determine whether the relationship between the admitted father and admitted mother of this boy was such as to constitute a state of marriage.

I think the testimony shows, and you will be fully justified in starting off in consideration of that issue with the fact that the beginning of the relationship between the mother and father of this boy was illicit. That they were not husband and wife. There is certain testimony to that effect. Now, you have on that question, as the Court sees it, and you are not limited, gentlemen of the jury to what the Court sees and what the Court hears and understands, but you are to find your verdict and base your conclusions on anything that you heard, saw or understood from the witness stand or from any document offered in evidence, and that any comment the Court makes on the testimony is merely intended to be helpful to the jury in drawing their attention to what appears to the Court to be the salient points bearing on the issue presented.

You have before you testimony of the first witness on the stand, the name escapes me—Tom Polite. A rather intelligent specimen. A man who you would be warranted and justified, from his own testimony, was somewhat above the average of negroes in his vicinity. He testified that the veteran Jake Jackson as he carried him from his work to his home community, backwards
(46) and forward from time to time, when he was working with the railroad company, his actual work being on the road quite a distance from his home community; that when he carried him backwards and forward, it was within his knowledge that Jackson would repair to the home of this boy's mother, and that when Jackson was ready to go back with him to his work on Monday morning, he would come from the home of this boy's mother. That they were never married so far as he knew. In fact, I think his testimony goes further than that and says he knew they were not married to the extent that no ceremony was ever performed, or that they went together as married people with the intention of living together

as man and wife, and that his only knowledge and only observation of these two people was that when in Ridgeland or Mitchellville, a suburb of the large city of Ridgeland, Jackson would buy groceries, take them with him to this woman's house, and also his knowledge is that children were born.

You have the testimony of the veteran's sister, and she does not attempt to intimate that there was any legal principle in the inception of the relations between her brother and the mother of this boy, but that they lived together and everybody knew it in the community, and when she was asked the question—and I quote not only from recollection, but from the stenographer's transcript of her testimony. She was asked the question "Was it general reputation and known in that community that Jake and your sister Grace lived together?" This was not the veteran's sister, but the sister of the mother of the boy. Her answer is "As man and wife. That is all I know. They lived together as man and wife." She (47) testified as to other facts which would not support the theory of the marriage status, but would only verify the admitted fact that these two people were living together in that she testified she lived right close to the house of her sister, and Jake went there and lived there and bought groceries and carried them there, and these children were born and he looked after the boy, claimed the boy was his, and provided for him, and so forth.

Now, gentlemen, we have a character whose testimony you have heard. Rather boastful of his actings and doings so far as the relations between Grace's sister and himself were concerned. He testified that he was on friendly terms with Maria, the woman whom you heard testify. He testified that Jake had been knocking around there something over two years, that is, in connection with his statements about Jake going to the house of Grace and spending the night. Then he says conditions arose when they wanted him to marry. He says, "He asked me to marry too but I slip in and out, but they hold him in there to marry". "Who held him?" "Grace. She hold him to marry her and she say when he did marry she was going to put him to law. That ease me out, because I didn't want to get married."

Now, gentlemen, you have a right to conclude that there was a question after about two years of this illicit

relationship as to whether or not Jake should marry Grace, and that after that question arose Jake continued to live with Grace. Now, from that testimony of his partner, who was intimate with the one sister, do you infer that the continued relationship between Jake and (48) Grace constituted a status of marriage? He was asked "What was the general reputation in that little community as to the father and mother of this child, and with whom Jake lived?" His answer was, "They expected Jake like he was living as that girl's husband". Gentlemen, you have the right to interpret that as you think it ought to be interpreted. As an answer to that question, did he mean they expected Jake like he was living as that girl's husband or amount to testimony to the effect that the relation between the father and mother of this boy when the question arose prior to the boy's birth, from that time and on until after the boy's birth and the departure of the husband or the father? Whether those relations were such as to create in that community, and it doesn't have to extend beyond the community to do it—community generally means people who know you and know what you are doing and what you hold yourself out to be, and what you are. But the fact that you are living or that one is living with a woman is not sufficient for a community to conclude that they are married. There must be statements or circumstances *beoind* that to justify a finding that the relationship was no longer illicit, but had become that of husband and wife through the way in which they conducted themselves, and the way they held themselves out to that community.

Now, gentlemen, you have heard the argument here, and the fact that is disclosed in the testimony that when Jake Jackson went into the Army he did not disclose that he had a wife and child or children. In that connection I charge you that you have a right to consider (49) two things: The law of marriage as I have given it to you in South Carolina, and whether this father of this child knew himself to be a married man, not as a result of anything that he had said or anything that he had done necessarily, but as a legal result of his conduct and his daily representations to the people of his community.

I charge you that you may also take into consideration ignorance of the veteran, the soldier, as disclosed by the fact referred to in the argument—I haven't seen

the papers—that the papers required to be signed by the soldier were signed by Jake Jackson's mark. And whether of his limited understanding, and having lived in the community of Mitchellville and worked on the railroad every day, whether he had the mental capacity to realize, if it was a fact, that there was any question with relation to his dependents, and whether or not his legal responsibilities and liabilities were such as is required to be disclosed by these examinations at the time of enlistment, or prior to the enlistment, whether he had sufficient knowledge to realize that as a matter of law. If you so find and consider the testimony as to whether there was or not, and bring yourself to that conclusion as a matter of fact, whether he owed any responsibility to the woman he had been living with, or to her child, whether it was incumbent upon him to disclose that to the government.

In all events, gentlemen, the question for you, being on your oath, is "We find for the plaintiff", or "We find for the defendant". You can only find for the plaintiff if, upon consideration of all the matters that I have (50) referred to, or any other matters to your knowledge disclosed on the witness stand, or through documentary evidence in this case, you shall be satisfied by the weight of the testimony that the claimant in this case, Ben B. Jackson, was the legitimate child of Jake Jackson, the veteran, through whose war service or army service he claims these benefits. You must be satisfied by the weight of the testimony, the greater weight of the testimony. If consideration of all of these matters leads you to think that possibly they may have lived in this community in such a way as to hold themselves out as married persons, that isn't sufficient. You must be satisfied in your minds by the greater weight of the testimony that, taking all the circumstances into consideration, considering the principals, considering the community, the manner of life there, knowledge of their responsibilities insofar as they can be traced, all of these things you must rely upon if you rely upon any of it as warranting you as a jury of reasonable honest South Carolinians in finding a verdict for the plaintiff. If you are not so satisfied beyond a reasonable doubt, it is equally your duty to write on the back of this complaint "We find for the defendant", the result of which will mean, as I understand this case, that you are not satisfied by

the greater weight of the evidence that Ben B. Jackson, named in this complaint, is the legitimate child of Jake Jackson.

Mr. EDMUNDS: If your Honor please, the defendant would like to note an exception to your Honor's charge insofar as you charged the jury to this effect: That a (51) marriage might be legitimate without agreement between the man and woman that they were husband and wife. Now, that is not exactly the language your Honor used, but as I understand it, that is the effect of your Honor's charge. Now, we think that a man and woman can only be husband and wife—

The COURT: Gentlemen of the jury, if you understood me to say that there is a possibility of the marriage state existing between two parties without their agreement, I tell you now that is not the law, and you should not infer from anything I said if as a matter of agreement between the parties they continued to live together, although their prior relation had been an illicit relation, if at any time during that period they agreed to live together as husband and wife, then I charge you that that would create a marriage status, and without that agreement there could be no marriage status. But in the absence of testimony of one or the other as to whether there was an agreement, that could only be evidenced by their conduct, and the way in which they held themselves out to the community, to determine whether or not there was such an agreement.

(Exception allowed to the matter charged, so amplified.)

Mr. EDMUNDS: Might I suggest further your Honor, you have charged the jury to this effect, as I recall it: That the soldier may have failed to disclose that he was a married man for the reason that he didn't have sufficient mentality to know that he was married man. Now, (52) we think that that could not be the law for the reason there must be an agreement, a meeting of the minds, between him and the woman, and that if he didn't have sufficient mentality to know that, he could not, therefore, have been a married man. And we would ask an exception to that portion of the charge, your Honor.

The COURT: If the jury drew exactly that inference from what I said about his disclosures to the examining board, then I was very lax in my use of language. Gentlemen, what I endeavored to convey to the jury was that they woul be justified in connection with that disclosure to the examining board only in the event that they thought there was testimony to show their reputation in the community, and the way in which they held themselves out to the community, that they would give weight to his failure. On the other hand, and on the other side, his failure to disclose to the examining board that he did have a wife and child, that they would under the circumstances in this case be justified in giving consideration to the mental ability of the soldier to realize that by his continuing to live with the mother of this boy under circumstances which would enable the jury to reach the conclusion that they were considered as husband and wife. That in weighing the testimony on the other side, relied upon by the government, that being a part of his failure, to disclose it at that time, that they might consider that question. Not if he didn't have sufficient mentality to understand that he was married so much as whether he had sufficient mentality to understand what the effect of his disclosures to the examining board would be.

(53) In other words, I think I have already covered the point gentlemen that you in examining into this question haven't got Jake before you, and you haven't got Grace before you, and you can't find out from either one of them whether they agreed to live together as husband and wife, and that is the reason that the law says that conduct in the community and the way each holds himself out to the other in the community must determine that question, and would even go to the point of contradicting, if strong enough in circumstances, the statement of either one or both parties later on that they were not married. That is my idea of the law.

(Exception allowed to the charge on this point so amplified and explained.)

The COURT: Upon consideration of every circumstance detailed here, all the testimony you have heard, and such documents as you have heard read and such

as you want to carry to the Jury Room with you, you must be satisfied by the greater weight of the testimony that Ben B. Jackson is the legitimate child of Jake Jackson, you write a verdict "We find for the plaintiff". If you cannot satisfy yourselves beyond a reasonable doubt on that point by consideration of the testimony, then it is your duty to find for the defendant.

VERDICT.

The verdict of the jury was as follows: "We find for the Plaintiff."

EXHIBITS.

DEFENDANT'S EXHIBIT No. 2.

(54) Defendant's Exhibit No. 2 is as follows:

THE STATE OF SOUTH CAROLINA,
County of Jasper.

By L. S. McCormack, Probate Judge.

To Alphene W. Dowell,

WHEREAS, an application in due form of law, as appears by proceedings recorded in the office of the Probate Court for the County of Jasper in said State, has been made to me by Ben B. Jackson, to appoint Alphene W. Dowell, as Guardian of the person and estate of the said Ben B. Jackson, a minor now residing in Near Ridgeland, S. C. entitled to a distributive share in the estate of Jake Jackson, late of Jasper County, S. C. deceased.

AND WHEREAS, the said Alphene W. Dowell, has filed his bond in bond in this office as such Guardian as required by law.

NOW, THEREFORE, for the better securing the said estate for the benefit of the minor, and for him more careful maintenance and education, I do hereby commit the tuition, guardianship and education of the said Ben

B. Jackson, to you, the said Guardian charging you to maintain Him in meat, drink, washing, lodging, clothing, and such good education, as may be fitting, according to the circumstances of interest of the said Ben B. Jackson during his minority, take charge of his estate, and of your management thereof, when thereunto duly required.

(55) Given under my Hand and Seal, this 29th day of June in the year of our Lord one thousand nine hundred and thirty-five, and in the 159th year of the Independence of the United States of America.

(Signed) L. S. McCORMACK,
(Seal) Probate Judge for Jasper County, S. C.

DEFENDANT'S EXHIBIT No. 3.

This Exhibit is a certified copy of the records of the Adjutant General's Office pertaining to the veteran, Jake Jackson, the only pertinent parts of which to be included here are as follows:

QUESTIONNAIRE

BOARD FOR THE COUNTY OF CAMDEN, STATE OF GEORGIA, ST. MARYS, GA. (Stamp of Local Board)	Serial No. 398 Order No. 231	Name of Registrant: JAKE (Christian Name) JACKSON (Surname) Address ..... Street and Number of R. F. D. City—Tarboro County—Camden State—Ga.	Telephone No. .....

NOTICE TO REGISTRANT.—You are required by law to return this Questionnaire filled out in accordance with instructions contained herein within seven days from date of this notice. Failure to do so is a misdemeanor punishable by fine or imprisonment for one year and may result in the loss of valuable rights and in immediate induction into military service.

(Date) Dec. 24, 1917.

J. H. RUDOLPH,
Member of Local Board.

CLAIM FOR EXEMPTION OR DEFERRED CLASSIFICATION

NOTE TO CLAIMANTS.—This form is to be used for claiming exemption or deferred classification by or in respect of any registrant and for stating the grounds of claim. Place a cross (x) in Column A opposite the division that states the ground of claim. Boards are required to consider only grounds thus indicated by the claimant in Column A.

Column A.	Division	CLASS I.
.....	A	Single man without dependent relatives.
.....	B	Married man, with or without children, or father or motherless children, who has habitually failed to support his family.
(56)		

Column A.	Division	CLASS III.—Continued
.....	E	Highly trained fireman or policeman, at least 3 years in service of municipality.
.....	F	Necessary customhouse clerk.
.....	G	Necessary employee of United States in

	C	Married man dependent on wife for support.
	D	Married man, with or without children, or father or motherless children; man not usefully engaged, family supported y income independent of his labor.
	E	Unskilled farm laborer.
	F	Unskilled industrial laborer.
		Registrant by or in respect of whom no deferred classification is claimed or made.
		All registrants not included in any other division in this schedule.
		CLASS II.
	A	Married man with children or father of motherless children, where such wife or children or such motherless children are not mainly dependent upon his labor for support for the reason that there are other reasonably certain sources of adequate support (excluding earnings or possible earnings from the labor of the wife), available, and that the removal of the registrant will not deprive such dependents of support.
	B	Married man, without children, whose wif , although the registrant is engaged transmission of the mails.
	H	Necessary artificer or workmen in U. S. armory or arsenal.
	I	Necessary employee in service of United States.
	J	Necessary assistant, associate, or hired manager of necessary agricultural enterprise.
	K	Necessary highly specialized technical or mechanical expert of necessary industrial enterprise.
	L	Necessary assistant or associate manager of necessary industrial enterprise.
		CLASS IV.
	A	Man whose wife or children are mainly dependent on his labor for support.
	B	Mariner actually employed in sea service of citizen or merchant in the United States.
	C	Necessary sole managing, controlling, or directing head of necessary agricultural enterprise.
	D	Necessary sole managing, controlling, or directing head of necessary industrial enterprise.

(57)

		in a useful occupation, is not mainly dependent upon his labor for support, for the reason that the wife is skilled in some special class of work which she is physically able to perform and in which she is employed, or in which there is an immediate opening for her under conditions that will enable her to support herself decently and without suffering or hardship.
.....	C	Necessary skilled farm laborer in necessary agricultural enterprise.
.....	D	Necessary skilled industrial laborer in necessary industrial enterprise.
		CLASS III.
.....	A	Man with dependent children (not his own) but toward whom he stands in relation of parent.
.....	B	Man with dependent aged or infirm parents.
X	C	Man with dependent helpless brothers or sisters.
.....	D	County or municipal officer.

		CLASS V.
.....	A	Officers—legislative, executive, or judicial of the United States or of State, Territory or District of Columbia.
.....	B	Regular or duly ordained minister of religion.
.....	C	Student who on May 18, 1917, was preparing for ministry in recognized school.
.....	D	Persons in military or naval service of United States.
.....	E	Alien enemy.
.....	F	Resident alien (not an enemy) who claims exemption.
.....	G	Person totally and permanently physically or mentally unfit for military service.
.....	H	Person morally unfit to be a soldier of the United States.
.....	I	Licensed pilot actually employed in the pursuit of his vocation.
.....		Member of well-recognized religious sect or organization, organized and existing on May 18, 1917, whose then existing creed or principles forbid its members to participate in war in any form, and whose religious convictions are against war or participation therein.

REGISTRANT OR OTHER INTERESTED PERSON MUST ANSWER THE FOLLOWING QUESTION

Q. Do you claim exemption or deferred classification in respect of the registrant named above? If so, state the divisions of each class and each class in which you claim that he should be classified.

A. Yes; in Division C of Class 3, and Division ..... of Class ....., and Division ..... of Class ..... (Date).....

(Address.).....

(Sign here) JAKE his x mark JACKSON.

(58) WAIVER OR CLAIM FOR EXEMPTION OR DEFERRED CLASSIFICATION.

(To be signed by registrant or other interested person whenever a waiver is used.)

I hereby waive all claim of exemption or deferred classification of the registrant named above.

(Sign here).....

(Date of signing.) .....

CLINICAL RECORD.

BRIEF.

19

Hospital Base
Register No. 12214 Ward 32
Name Jackson, Jake
Rank Pvt. Co. 56 Regt. or Staff Corps 157th D. B.
Age (years) 24 Race C Service (years) 5/365
Birthplace S. C.
Station Camp Gordon, Ga.
Date of admission May 4, 1918
Source of admission Infirmary
157th D. B.
Religion None.
Home address Born, S. C.
Name and address of nearest relative Sister, Miss Agness Jackson, Ridgeland, S. C.
Initials of admitting officer J. E. Traxler
(JES)

(To be filled in by ward surgeon when case is completed)

Disposition Dead, 10:30 P. M.
Date May 11, 1918.
Final diagnosis Lobar pneumonia, right middle and
(59) lower lobes and left lower lobe
Condition on completion of case Dead
1st Lt. G. C. Brooke, M. R. C.
1B Ward Surgeon.

TELEGRAM

18 Poon53Govt

Camp Gordon Ga May 12, 1918

Adjt General of the Army, Washington DC

Private Jake Jackson 56 th pro. Colored company 157 depot brigade never claimed has no identification number died from pneumonia May 11th 1918 emergency address Agnes Jackson Ridgeland SC

ROBERT B. TROUTMAN
Captain Inf R C. Commanding Co

Received A. G. O. MHay 13 1918

143pm

W. R. B. and Q. M. C.

Notified May 13, 1918.

MOTION FOR NEW TRIAL.

Counsel for the Government moved that the verdict of the jury be set aside and a new trial granted upon the following grounds:

First: That the Court was without jurisdiction to entertain this cause for the reason that the Plaintiff's cause of action was based upon a claim for what is known as automatic insurance, and since automatic insurance was a gratuity, an action thereon was barred by the repealing clauses of the Economy Act of 1933.

(60) *Second*: That the verdict of the jury was contrary to the greater weight of the evidence, there being no sufficient testimony upon which the jury might reasonably base a verdict for the Plaintiff.

ORDER REFUSING NEW TRIAL.

The Order of the Court refusing the motion for a new trial is as follows:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

Ben B. Jackson, by his Guardian Alphene W. Dowell, Plaintiff, *vs.* United States of America, Defendant,	Order Refusing New Trial

This cause was submitted to a jury at the January term in Charleston, to determine the sole issue then raised,—whether the minor claimant was the legitimate child of one Jake Jackson, who was drafted into service from Jasper County, South Carolina, on the 27th day of April, 1918, and who died in the army service on the 11th day of May, 1918. The claim of the minor was submitted to the Bureau under Sections 400 and 405 of the War Risk Insurance Act of September 2, 1914, by a guardian appointed in the Probate Courts of Georgia. Notice was given that the claim had been allowed and the allotment made under Section 401, and would be paid to anyone authorized to receive it in the minor's behalf by the Probate Court of Jasper County, South Carolina, where the claimant resided. A guardian being then ap-
(61) pointed in Jasper County, South Carolina, as required, the Director of the Bureau refused to pay, giving the reason that investigation failed to show that Ben B. Jackson was the legitimate child of the soldier by right of whose services the claim was made.

Marriage in South Carolina is not a civil contract, but a status. The evidence adduced on trial showed that the soldier Jackson—an ignorant negro—had been living in a suburb of Ridgeland, Jasper County, with a woman not his wife. When the woman became pregnant, the question of marriage arose. They continued to live together openly as husband and wife, the woman and her child—the claimant here—supported by Jackson. The woman retained her name, but the child was called Jackson, and was recognized as his in the community

where they were "accepted as husband and wife". Testimony to this effect was accentuated by a "buddy" of Jackson's, a co-laborer on a railroad gang, who told of his relations with a sister of Jackson's "woman" at the time the question of marriage arose, and of their continuation illicitly, in a quite different way from the recognized and open course thereafter followed by Jackson and the mother of his son.

The defence relied upon the statements of Jackson when he entered the service that he was unmarried and that his nearest relative was a sister.

(62) Under the law of this State, continuance of illicit relations between a man and a woman cannot of themselves ripen into a marriage, but declarations and manner of the parties, following a period of concubinage, may be liberally construed to create a state of marriage in support of legitimacy of offspring, and of rights arising under the laws of dower and of inheritance. Every case, therefore, in which the question arises, is determined by its own particular facts and circumstances. It may well follow then, that a man—and particularly an ignorant laborer such as Jackson was,—may not be conscious, in the absence of a marriage ceremony or specific declarations recognizing a state of marriage, that in the eye of the law he is a married man and father of a child recognized as legitimate under the inheritance statutes and otherwise.

So was the jury informed as to the law, and their verdict settled the legal rights of the claimant, with ample support in law and fact.

The Government now submits as proper for the Court's consideration on this motion, under authority of *United States* vs. *Trollinger* (Fourth Circuit—Jany. 6th, 1936), 81 Fed. (2d) 167, that plaintiff's claim for automatic insurance is in the nature of a gratuity or pension, and is barred by the repeal clauses of the Economy Act of 1933.

This Court is not entirely convinced that Judge Parker's opinion in *United States* vs. *Trollinger* would justify consideration of this point on motion in arrest (63) of judgment. The record shows that Government counsel have limited the issue on trial solely to legitimacy of claimant, and there is no suggestion of any after discovery as in the Trollinger case.

However, I am satisfied, from full consideration of the War Risk Insurance enactments, the Economy Act, and of the decision of the Supreme Court in *Lynch* vs. *United States*, 292 U. S. 571, relied upon to sustain the motion on this point, that it cannot prevail, and should be disposed of.

In *Lynch* vs. *United States, supra*, policies of yearly renewable term insurance issued under the War Risk Insurance Act are held to be, not gratuities, but contracts of the United States, and as such cannot be invalidated by subsequent Acts of Congress.

Did Jake Jackson, the soldier, have a contract with the United States for benefits to accrue to his son, Ben B. Jackson, which the son may now enforce? He had no policy issued to him in fact,—as presumably the plaintiff in the Lynch case had. If he had a contract, how was it created?

The War Risk Insurance Act of 1917, by Article IV, Sec. 400, expressly providing "greater protection for themselves (enlisted men) and their dependents", provides for the issuance, upon application and without medical examination, of "insurance against death or permanent disability" in stated multiples. Sec. 401 limits the time within which application may be made for "such insurance", with the further provision:

(64) "Any person in the active service on or after the sixth day of April, nineteen hundred and seventeen, who while in such service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his wife from the time of his death and during her widowhood, or to his child, or widowed mother if and while they survive him: *Provided, however,* That not more than two hundred and forty of such monthly installments, including those received by such person dur-

ing his total and permanent disability, shall be so paid; and in that event the amount of the monthly installments shall be apportioned between them as may be provided by regulations."

Jackson, the soldier, was drafted into the service on 27th day of April, 1918, and died on the 11th day of May, 1918. Under the provisions of Sec. 401, having died in the service before the expiration of one hundred and twenty days without having applied for insurance, he, by the express terms of the Act, is "deemed to have applied for *and to have been granted insurance*", payable (65) by a limited number of monthly installments to his child (the mother having also died), if the child be alive for the number of months designated.

United States vs. *Carlson,* 44 Fed. (2d) 5.
Cunningham vs. *United States,* 67 Fed. (2d) 714.

If the Act under which this right accrued was dealing with gratuities or pensions, it does not say so. Article IV of the War Risk Insurance Act of 1917 is headed "*Insurance*". The claim here is based upon "*insurance*" deemed to have been applied for and granted", and claimant, otherwise entitled, "it to be regarded and dealt with as though he were an actual policyholder under that Act". *United States* vs. *Carlson, supra.*

It was also pointed out in argument that benefits accrued and allowed under Sec. 401 before the passage of the Economy Act of 1933 have not been construed by the Bureau as withdrawn and are now being paid to such claimants.

Motion denied.

EXCEPTIONS TO ORDER REFUSING NEW TRIAL.

Now comes the United States of America, Defendant in the above cause, by Claud N. Sapp, Esquire, United States Attorney, and excepts to the Order refusing the Defendant's motion for a new trial upon the following grounds, to-wit:

First, to the ruling of the Court that, as a matter of law, this action, being a suit based upon what is commonly called automatic insurance, was not barred by (66) the repealing clauses of the Economy Act of 1933.

Second, to the ruling of the Court as a matter of law that under the law of South Carolina a man "may not be conscious, in the absence of a marriage ceremony or specific declarations recognizing a state of marriage, that in the eye of the law he is a married man and father of a child recognized as legitimate under the inheritance statutes and otherwise", for the reason, it is respectfully submitted, that there can be no marriage between a man and woman in South Carolina, common law or otherwise, unless they thought and considered themselves to be man and wife.

CLAUD N. SAPP,
United States Attorney.
By S. HENRY EDMUNDS, JR.,
Asst. U. S. Attorney.

The above exceptions of the Defendant taken to the Order of this Court overruling the motion for a new trial by the Defendant herein are hereby allowed.

FRANK K. MYERS,
United States Judge for the Eastern
District of South Carolina.
March 31, 1935.

The foregoing constitutes all of the pertinent evidence introduced at the trial of this case. The Defendant tenders and presents the foregoing as its Bill of Exceptions in this case to the action of the Court and prays that the same may be settled, allowed, signed and sealed (67) by the Court, and made a part of the record in this case.

CLAUD N. SAPP,
United States Attorney.
S. HENRY EDMUNDS, JR.,
Asst. U. S. Attorney.

The foregoing Bill of Exceptions duly presented, allowed, settled, signed and sealed this 20th day of July, 1936, the same being in due time and within the term as extended by standing Rule 43 of this Court in effect on and after January 1, 1931, and by Order of this Court.

FRANK K. MYERS,
United States Judge,
Eastern District, South Carolina.

NOTICE.

To R. K. Wise, Esq., and A. W. Dowell, Esq., Attorneys for the Plaintiff:

You will please take notice that the Defendant proposes the foregoing as its Bill of Exceptions in this case.

CLAUD N. SAPP,
United States Attorney.
S. HENRY EDMUNDS, JR.,
Asst. U. S. Attorney.

Charleston, S. C., June 26, 1936.

Due and legal service of the foregoing Bill of Exceptions accepted and acknowledged, and a copy thereof (68) retained, this 27th day of June, 1936.

R. K. WISE,
A. W. DOWELL,
Attorneys for Plaintiff.

(69) **ADDENDUM TO BILL OF EXCEPTIONS.**

Filed August 27, 1936.

The two letters hereinafter set out were inadvertently omitted from the Bill of Exceptions settled, signed and filed in this case on the 20th day of July, 1936:

"Mrs. Agnes Jackson,
Ridgeland, S. C.

July 9, 1918.

In re: C-16485
Jake Jackson
56th Co. 157th
Depot Brigade

Dear Madam:

"The Act of October 6, 1917, has been recently amended, extending the class of beneficiaries entitled to compensation, which is separate from and in addition to contract insurance.

"In order to enable this Bureau to determine whether or not any claim for compensation existed in this case, you are requested to answer all the questions on the amended form 501, a copy of which is enclosed, and return same promptly to this Bureau.

"All correspondence with this Bureau, relative to this case should bear the full name, rank, organization and file number of the soldier as given above.

Very truly yours,

Deputy Commissioner Compensation.

NLH/amp Per....."

(70) "EMERGENCY INFORMATION C-16485

TREASURY DEPARTMENT
BUREAU OF WAR RISK INSURANCE

"Miss Agnes Jackson, Washington, D. C.,
Ridgeland, S. C. July 9, 1918.

Dear Madam:

"It appears that Jake Jackson, who died May 11, 1918, while serving 56th Co. 157th Depot Brigade gave your name and address for use in emergency.

"Please furnish the information requested below, and return in inclosed envelope, which needs no postage. Kindly answer every question.

Deputy Commissioner Compensation.

amp Per .....

1. Your relationship to him, if any: Sister.
2. Name of his widow, if any: He was single.
3. Her post-office address: X
4. Names and addresses of his children, if any: None.
5. Name and address of mother: No mother living.
6. Was she dependent for support on deceased? He was her support before her death.
7. Name and address of father: No father living.
8. Was he dependent for support on deceased? He was his Father's support before his death.

AGNES JACKSON.
(Signature)
Ridgeland, S. C.
(P. O. Address)"

(71) The Defendant tenders and presents the foregoing as an Addendum to the Bill of Exceptions in this case, which was inadvertently omitted in the original Bill of Exceptions, and prays that the same may be settled, allowed, signed and sealed by the Court and made a part of the original Bill of Exceptions herein heretofore filed, and a part of the record in this case.

CLAUD N. SAPP.
United States Attorney.
S. HENRY EDMUNDS, JR.,
Asst. U. S. Attorney.

The foregoing Addendum to the Bill of Exceptions herein embracing two letters, which were inadvertently omitted from the original Bill of Exceptions in this case heretofore settled, signed and filed, duly presented, allowed, settled, signed and sealed this 25th day of August, D. D. 1936.

FRANK K. MYERS,
United States Judge for the
Eastern District of S. C.

NOTICE.

To: R. K. Wise, Esq., and A. W. Dowell, Esq., Attorneys for the Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Defendant proposes the foregoing as an Addendum to the Bill of Exceptions in this case.

CLAUD N. SAPP,
United States Attorney.
S. HENRY EDMUNDS, JR.,
Asst. U. S. Attorney.

Charleston, S. C., August 17, 1936.

(72) Due and legal service of the foregoing Addendum to the Bill of Exceptions accepted and a copy thereof retained this 20 day of August, A. D. 1936.

R. D. WISE,
A. W. DOWELL,
Attorneys for Plaintiff.

(73) **ASSIGNMENT OF ERRORS.**

Filed Sept. 15, 1936.

Now comes the Defendant, United States of America, and in connection with its Petition for an Appeal herein makes the following assignment of errors, which it states occurred upon the trial, and in the record and proceedings in this cause:

1. The Court erred, it is respectfully submitted, in overruling Defendant's motion for a directed verdict in its favor for the reason that Sec. 401 of the War Risk Insurance Act was repealed by the Economy Act of March 20, 1933, and, therefore, Plaintiff's cause of action was barred.

2. The Court erred, it is respectfully submitted, in overruling Defendants motion for a directed verdict in its favor for the reason that this suit was not brought within the time prescribed by law and, therefore, is barred

by the limitations contained within the Acts of Congress relative to War Risk and Automatic Insurance.

3. The Court erred, it is respectfully submitted, in overruling Defendant's motion for a directed verdict in its favor for the reason that there was not sufficient evi-
(74) dence upon which the jury might reasonably find that a common law marriage existed between the veteran and the mother of the minor Plaintiff.

4. The Court erred, it is respectfully submitted, in overruling Defendant's motion for a directed verdict in its favor for the reason that no Disagreement between the Plaintiff and the Defendant existed at the time of filing this suit, as required by the War Risk Insurance Act as amended, and, therefore, the Court had no jurisdiction to entertain this suit.

5. The Court erred, it is respectfully submitted, in excluding from evidence the letter dated July 9, 1918, from officials of the Defendant to Mrs. Agnes Jackson, Ridgeland, South Carolina, and the letter containing the reply of Agnes Jackson (which said letters are set out in full in the exhibits contained in the Bill of Exceptions), for the reason that the letters were not only competent evidence, but their contents were highly relevant to the issue submitted to the jury, the exclusion of which evidence was highly prejudicial to the Defendant's case.

6. The Court erred, it is respectfully submitted, in refusing Defendant's motion for a new trial, for the reason that the action of the Court in refusing said motion was based upon the erroneous holding that Sec. 401 of the War Risk Insurance Act was not repealed by the Economy Act of March 20, 1933.

7. The Court erred, it is respectfully submitted, in refusing Defendant's motion for a new trial, for the reason that the refusal of the said motion was based upon
(75) the following erroneous statement of the law:

"It may well follow then, that a man—and particularly an ignorant laborer such as Jackson was,—may not be conscious, in the absence of a marriage ceremony or

specific declarations recogniznig a state of marriage, that in the eye of the law he is a married man and father of a child recognized as legitimate under the inheritance statutes and otherwise.

"So was the jury informed as to the law, and their verdict settled the legal rights of the claimant, with ample support in law and fact."

WHEREFORE, for which errors and other errors apparent on the record, the Defendant prays that the said Judgment of the United States District Court for the Eastern District of South Carolina, dated July 3, 1936, be reversed and the same remanded, with directions to enter judgment for the Appellant, and for such other and further relief as may be proper in the premises.

CLAUD N. SAPP,
United States Attorney.
S. HENRY EDMUNDS, JR.,
Asst. U. S. Attorney.
Attorneys for the Defendant.

(76) **MEMORANDUM.**

Petition for and Allowance of Appeal, filed September 15, 1936.

Bond on Appeal (None).

Citation filed October 17, 1936.

Service accepted October 17, 1936.

STIPULATION FOR CLERK TO PREPARE TRANSCRIPT.

Filed October 17, 1936.

It is hereby stipulated and agreed that the Clerk of this Court shall make up a transcript of the record in the above-styled cause and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va.; and that it be printed

under the supervision of the Clerk of that Court, in accordance with Rule 23.

R. K. WISE,
ANDERSON G. ULMER,
Counsel for Plaintiff.

CLAUD N. SAPP,
S. HENRY EDMUNDS, JR.,
Counsel for Defendant.

October 9th, 1936.

(77) **CLERK'S CERTIFICATE.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.
AT LAW.

I, RICHARD W. HUTSON, Clerk of the District Court of the United States for the Eastern District of South Carolina, hereby certify, that the foregoing is a true and correct copy of the record and proceedings in the case of Ben B. Jackson, by his Guardian *ad litem*, Alphene W. Dowell, plaintiff, *against* the United States of America, defendant, together with the Order of Judgment and all papers relating to the same, as appears by the original record now on file in my office.

Given under my hand and seal of said Court, at Charleston, S. C., this 17th day of October, 1936.

RICHARD W. HUTSON,
(Seal) C. D. C. U. S. E. Dist. S. C.

Richmond Press, Inc.,
Richmond, Va.
6-12-36—65
Contract No. J-12317.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4120

UNITED STATES OF AMERICA, APPELLANT

v.

BEN B. JACKSON, BY HIS GUARDIAN AD LITEM, ALPHENE W. DOWELL APPELLEE

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston

October 20, 1936, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, and citation are certified up under section 7 of Rule 14.

Same day, the appearance of Claud N. Sapp, United States Attorney, is entered for appellant.

October 24, 1936, the appearance of S. Henry Edmunds, Jr., Assistant United States Attorney, is entered for the appellant.

November 18, 1936, twenty-five copies of the printed record are filed.

November 23, 1936, the appearance of Anderson G. Ulmer, R. K. Wise, and Warren E. Miller is entered for the appellee.

Affidavit of Alphene W. Dowell as to poverty

Filed November 25, 1936

[Style of Court and Title Omitted.]

STATE OF GEORGIA,
County of Chatham:

Alphene W. Dowell, being duly sworn according to law deposes and says: That he is the appellee in the above entitled action; that he is a citizen of the United States; and that he is unable to raise Twenty Five ($25.00) Dollars to cover the required deposit on account of Appellee's costs as required by Court due to the fact there is no money in this estate whatsoever. Deponent further states that on account of not having any funds in this estate he desires permission of the Court to be allowed to file typewritten copies of brief instead of printed copies.

ALPHENE W. DOWELL.

Sworn to and subscribed before me this 23rd day of November 1936.

(LS) [SEAL]

JOSEPHINE E. HOWARD,
Notary Public for Georgia.

My commission expires February 26, 1938.

Order allowing appellee to defend appeal in forma pauperis

Filed November 25, 1936

[Style of Court and Title Omitted.]

Upon the application of the Appellee, by his attorneys, R. K. Wise and Anderson G. Ulmer, and it appearing that the Appellee has filed an affidavit as to his poverty,

It is ordered that the Appellee be, and he is hereby, allowed to defend the appeal in this Court in the above entitled case in forma pauperis.

It is further ordered that the Appellee be, and he is hereby, permitted to file six typewritten copies of his brief instead of twenty printed copies, as required by the rules of this Court.

JOHN J. PARKER,
Senior Circuit Judge.

NOV. 25TH, 1936.

January 7, 1937, the appearance of Julius C. Martin, Director, Bureau of War Risk Litigation, is entered for the appellant.

January 18, 1937, the appearance of Young M. Smith, Attorney, Department of Justice, is entered for the appellant.

Argument of cause.

January 18, 1937 (January term, 1937), cause came on to be heard before Parker, Northcott, and Soper, Circuit Judges, and is argued by counsel and submitted.

Opinion filed April 6, 1937.

United States Circuit Court of Appeals, Fourth Circuit

No. 4120

UNITED STATES OF AMERICA, APPELLANT

v.

BEN B. JACKSON, BY HIS GUARDIAN AD LITEM, ALPHENE W. DOWELL, APPELLEE

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston. At Law

Argued January 18, 1937. Decided April 6, 1937

Young M. Smith, Attorney, Department of Justice, and S. Henry Edmunds, Jr., Assistant U. S. Attorney (Claud N. Sapp, U. S. Attorney; Julius C. Martin, Director, Bureau of War Risk Litigation, and Wilbur C. Pickett, Special Assistant to the Attorney General, on brief) for appellant, and R. K. Wise and Warren E. Miller (Anderson G. Ulmer and A. W. Dowell on brief), for appellee.

Soper, *Circuit Judge:* Ben B. Jackson, minor son and only child of a Negro veteran of the World War, brought suit through his guardian against the United States in the District Court for automatic insurance benefits of $25 per month under the terms of Section 401 of the War Risk Insurance Act as amended October 6, 1917, 40 Stat. 409. Jake Jackson, the soldier, was drafted into the Army on April 27, 1918, and died on May 11, 1918, without having applied for War Risk Insurance. Section 400 of the Statute provides for the granting to enlisted men of insurance from $1,000 to $10,000 against death or total disability upon the payment of certain premiums; and Section 401 provides that such insurance must be applied for within 120 days after enlistment, except that any person in the Government Service after April 6, 1917, who becomes totally and permanently disabled, or dies, before the expiration of 120 days without having applied for insurance "shall be deemed to have applied for and to have been granted insurance payable to such person during his life in monthly installations of $25 each"; and that in case of death before having received any such installment then $25 per month for not more than 240 months shall be paid to his wife from his death during widowhood, or to his child or children if any survive him. See also Section 19 of the Act of June 25, 1918, 40 Stat. 614, Section 12 of the Act of December 24, 1919, 41 Stat. 374, and Sections 600, 601, 602 of the World War Veterans' Act of June 7, 1924, 43 Stat. 629–630.

The action was instituted on October 14, 1935. The defenses were (1) that the statutory provision for automatic insurance was repealed by Section 17 of the Economy Act of March 20, 1933, 48 Stat. 11, 38 U. S. C. A. 717; and (2) that there was no substantial evidence of a marriage between the parents of the child and hence that the plaintiff had not satisfied the provisions of Section 22 of the War Risk Insurance Act, as amended, 41 Stat. 371, that the term "child" in the Act includes either a legitimate child, a child legally adopted, a stepchild in the man's household or an illegitimate child if acknowledged in writing by the father or if he has been judicially ordered to contribute to the child's support or judicially declared to be the putative father of the child. The District Judge ruled against the Government on both points and, the jury having considered the evidence bearing on the legitimacy of the child, found a verdict for the plaintiff.

The basic contention of the United States with regard to the first point is that the automatic insurance provided by the War Risk Insurance Act was a gratuitous death or disability allowance and not a contract. It is pointed out that the insured paid no premiums and received no written certificate or policy of insurance, and hence it is said that the provisions of the Act come within the scope of Section 17 of the Economy Act which repealed "all public laws granting medical or hospital treatment, domiciliary care, compensation, and other allowances, pensions, disability allowances or retirement pay to veterans and dependents of veterans of the World War."

Thus the case is distinguished from the decision in the case of Lynch vs. U. S., 292 U. S. 571, which held that a policy of renewable term insurance is a contract creating vested property rights, which Congress had no power to take away without compensation. Support for this position is found in Stevens v. U. S., 85 F. (2) 570, and in the unreported decision of the District Court of Nebraska in Luther H. Dill v. United States.

In our opinion, however, this position is not tenable because the intention of Congress to place automatic insurance in the same category as insurance for which application has been made seems to be clearly set out in the Act. Section 401 expressly provides that any person in the active service on or after April 6, 1917, who becomes totally and permanently disabled or dies within 120 days after the publication of the terms of the insurance contract without having applied for insurance "shall be deemed to have applied for and to have been granted insurance." This language occurs not only in Section 401 in the Act of October 6, 1917, 40 Stat. 409, and in Section 19 of the Act of June 25, 1918, 40 Stat. 614, but it remained as a part of the War Risk Insurance Act through all the amendatory legislation; and although the Act was repealed in principal part by Sections 600–601 of the World War Veterans Act of June 7, 1924, 43 Stat. 629, Section 602 of that Act provided that the repeal should not affect any act done or any right or liability accrued before the repeal, but all such rights and liabilities should continue and be enforced in the same manner as if the repeal had not been made.

It is obvious that Congress chose to consider the induction of the soldier into the service and his disability or death within 120 days thereafter as equivalent to an application for and a grant of insurance, so that a contract of insurance of equal validity to those for which application should be made would come into existence; and since Congress accepted the military service as the basis of the contract, it is of no moment that no written document was issued to the soldier or that no premium for the brief period of 120 days was required. None of the soldiers indeed made adequate money payment for the insurance granted, since the premiums paid were much below the approved standard in view of the risks involved. See Part II of Regulations and Porcedure, U. S. Veterans' Bureau, p. 1255, Bulletin No. 3, Active and Obsolete Issues as of December 31, 1928.

Heretofore the courts have proceeded on this assumption in sustaining the jurisdiction of the District Courts to entertain suits based on claims for automatic insurance. The right to bring an action against the United States was granted by the provision of Section 405 of the War Risk Insurance Act as amended on October 6, 1917, 40 Stat. 410, "that in the event of a disagreement as to a claim under the contract of insurance between the Bureau and any beneficiary or beneficiaries thereunder, an action may be brought against the United States." See also Sec. 13 of the Act of May 20, 1918, 40 Stat. 555, Section 19, of the Act of June 7, 1924, 43 Stat. 612. The

courts have held that automatic insurance is a contract within this language and that suit may be brought thereon against the United States in the Federal Courts. U. S. v. Carlson, 44 F. (2) 5, Caprio v. U. S., 45 F. (2) 520, Cunningham v. U. S., 67 F. (2) 714.

It may well be doubted that Congress had automatic insurance in mind when by Section 17 of the Economy Act it repealed all laws granting compensation, disability, and other allowances to veterans and dependents of veterans of the World War. The War Risk Insurance Act of October 6, 1917, was divided into articles, of which Article II referred solely to allotments and family allowances, Article III to compensation for death and disability, and Article IV to insurance, including automatic insurance; and it is reasonable to assume that Congress used these terms of the Economy Act in the sense in which they had become familiar to the Veterans' Bureau and to the public generally. And if it be supposed that the provision of the Economy Act which repealed all laws pertaining to yearly renewable insurance includes automatic insurance within its scope, we are met by the decision in Lynch vs. United States, supra, that this object was beyond the power of Congress to attain. We conclude that the Government's first defense in the pending case can not be sustained. We reached a similar result with regard to the lack of Congressional power to withdraw the privilege of applying unpaid compensation to the revival of a policy of insurance lapsed for nonpayment of premiums in U. S. v. Weaver, 86 F. (2) 372.

The remaining question is whether there was sufficient evidence of a common law marriage between the parents of the child to justify the submission of this issue to the jury. Both parents died shortly after the father's entry into military service. There was no evidence of a wedding ceremony, but there was evidence tending to show that the couple lived together as man and wife. For a term of five years before the war the man was working in a railroad gang who lived in cars at the scene of their labors during the week but generally returned to their homes at week ends. The father of the child spent practically all of his free time during these years at the home of the mother, which was situated a hundred yards or more from the house where he had previously lived with his sisters. No other man kept company with her during this period. Two children were born to the couple, a girl who lived only a few months, and a boy, the plaintiff, who was born eight months before the soldier was drafted. There was also evidence tending to show that the man supported the family, acknowledged the children as his own, and that the couple were known by general reputation in the community as man and wife.

On the other hand, doubt was thrown upon the character of the relationship between them by other evidence in the case. On at least one occasion the man, on returning to the settlement on Saturday evening, put his luggage in his sister's house and then went to the house of the mother of the child. The woman, although living openly with him, retained her maiden name, and she threatened to

force him to marry her when she was with child. When drafted the veteran claimed exemption because of dependent sisters and not because of a dependent wife and child. When he was taken to the hospital suffering with pneumonia he named a sister as his closest relative, and directed that she be notified if he should die.

Notwithstanding this conflict, there was enough evidence to submit the question of marriage to the jury. In Tedder vs. Tedder, 108 S. C. 271, the Supreme Court of South Carolina recognized the validity of a common law marriage in that state and held that the difference between marriage and concubinage, in circumstances such as these, rests in the intent of the cohabiting parties which may be evidenced by a public declaration or inferred from their actions. There was a substantial evidence in the pending case from which the intent of marriage might be inferred, and the issue was properly left to the decision of the jury. Furthermore, the plaintiff was entitled to the benefit of the provisions of Section 22 of the War Risk Insurance Act of October 6, 1917, 40 Stat. 401, whereby the provisions of R. S. Section 4075 (4705), 38 U. S. C. A. 198, were made applicable in the proof of marriages in compensation and insurance cases, with the result that a marriage is deemed to have existed under circumstances like those prevailing in this case without other evidence that the parties habitually recognized each other as man and wife and were so recognized by their neighbors, and lived together as such up to the date of enlistment.

Affirmed.

Judgment

Filed and Entered April 7, 1937

United States Circuit Court of Appeals, Fourth Circuit

No. 4120

UNITED STATES OF AMERICA, APPELLANT

vs.

BEN B. JACKSON, BY HIS GUARDIAN AD LITEM, ALPHENE W. DOWELL, APPELLEE

Appeal from the District Court of the United States for the Eastern District of South Carolina.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER,
U. S. Circuit Judge.

APRIL 7, 1937.

On another day, to-wit, May 10, 1937, the mandate of this Court in this cause is issued and transmitted to the District Court of the United States for the Eastern District of South Carolina, at Charleston, in due form.

Same day, the original petition for appeal and order allowing appeal are returned to the Clerk of the District Court at Charleston, South Carolina.

Clerk's certificate

United States of America, Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Asheville, North Carolina, this 28th day of June, A. D., 1937.

[SEAL]

CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals,
Fourth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, limited to the first question presented by the petition.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration and decision of this application.

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881—37——1

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 199

UNITED STATES OF AMERICA, PETITIONER

v.

BEN B. JACKSON, BY HIS GUARDIAN AD LITEM, ALPHENE W. DOWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case April 7, 1937.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of South Carolina (R. 46–49) in denying the Government's motion for a new trial is reported in 14 F. Supp. 132. The opinion of the Circuit Court of Appeals is reported in 89 F. (2d) 572 (R. 60–64).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 7, 1937 (R. 64). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

I

Whether the provisions for repeal contained in Section 17 of the Economy Act of March 20, 1933, were effective to rescind the right of a beneficiary of so-called "automatic insurance" to benefits which had been granted on account of the death of a soldier by Section 401 of the War Risk Insurance Act, as amended subsequent to the soldier's death.

The decision of this question involves the consideration of the following questions—

(a) Whether the beneficiary's right to "automatic insurance" benefits was founded upon contract.

(b) Whether the right, if not contractual, was nevertheless a vested property right protected from rescission by the Fifth Amendment.

(c) Whether Congress intended the provisions for repeal in Section 17 of the Economy Act to be effective as a rescission of rights to "automatic insurance" benefits if the Act was void insofar as it purported to rescind rights under contracts of yearly renewable (war risk) term insurance.

II

Whether there was substantial evidence of the existence of a common-law marriage between the infant plaintiff's father and mother at the time of his birth.[1]

STATUTES INVOLVED

Section 401 of the War Risk Insurance Act as amended December 24, 1919, c. 16, 41 Stat. 371, 374–375, provides in part:

> Any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before the expiration of one hundred and twenty days after entrance into or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each; and any person inducted into the service by a local draft board after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before being accepted and enrolled for active military or naval service, becomes or has become totally and permanently dis-

[1] The decision of this question by the Circuit Court of Appeals is not urged as a ground for the granting of this petition, but petitioner desires to reserve the point for argument in the event that the petition should be granted.

> abled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his widow from the time of his death and during her widowhood; or if there is no widow surviving him, then to his child or children; or if there is no child surviving him, then to his mother; or if there be no mother surviving him, then to his father, if and while they survive him: *Provided, however,* That no more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid. The amount of the monthly installments shall be apportioned between children as may be provided by regulations: * * *.

The War Risk Insurance Act was repealed by Sections 600 and 601 of the World War Veterans' Act, June 7, 1924, c. 320, 43 Stat. 607, 629–630. But all accrued rights and liabilities under the former Act were saved by Section 602 of the latter, which provided:

> The repeal of the several Acts as provided in sections 600 and 601 hereof shall not affect any act done or any right or liability

accrued, or any suit commenced before the said repeal, but all such rights and liabilities under said Acts shall continue and may be enforced in the same manner as if said repeal had not been made; * * *.

Section 17 of the Act of March 20, 1933, c. 3, 48 Stat. 8, 11, known as the Economy Act, provides in part:

> All public laws granting medical or hospital treatment, domiciliary care, compensation and *other allowances,* pension, disability allowance, or retirement pay to veterans and the dependents of veterans of * * * the World War, * * * are hereby repealed, and all laws granting or *pertaining to yearly renewable term insurance* are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted. The Administrator of Veterans' Affairs under the general direction of the President shall immediately cause to be reviewed all allowed claims under the above referred to laws and where a person is found entitled under this Act, authorize payment or allowance of benefits in accordance with the provisions of this Act commencing with the first day of the fourth calendar month following the month during which this Act is enacted and notwithstanding the provisions of section 9 of this Act, no further claim in such cases shall be required: ***Provided,*** That nothing contained in this sec-

> tion shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: * * * [Italics ours.]

Other statutes mentioned herein, together with a Congressional Committee Report and Bulletin No. 1 of the Treasury Department, are contained in the Appendix, *infra*, pp. 19–24.

STATEMENT

Ben B. Jackson, the respondent, an infant, brought this suit through his guardian in the District Court of the United States for the Eastern District of South Carolina to recover so-called "automatic insurance" benefits of $25 per month under Section 401 of the War Risk Insurance Act, as amended, by reason of the death of Jake Jackson, who had been drafted into the military service of the United States on April 27, 1918, and had died two weeks later, on May 11, without having applied for war-risk insurance. It was alleged in the complaint that the infant plaintiff was the only child of Jake Jackson, and that there was a disagreement with the Veterans' Administration as to

his claim. (R. 1–3.) The Government's answer contained a general denial of all of the allegations in the complaint except those as to the military service and death of Jake Jackson, and a specific denial that the infant plaintiff was his child, and set up as a separate defense that the suit was barred by the Federal statutes of limitations. (R. 3–4.)

At the trial before a jury it was established that in 1935 a claim for "automatic insurance" benefits was filed by the infant plaintiff's guardian on his behalf and was denied by the Veterans Administration. (R. 9–11.) The rest of the evidence related to the relationship existing between the infant plaintiff's father, Jake Jackson, and his mother at the time of his birth. (R. 12–28.)[2]

At the close of the case the Government moved for a directed verdict on the ground that there was no substantial evidence of the existence of a common-law marriage between Jake Jackson and the infant plaintiff's mother, and also upon the juris-

[2] The purpose of this evidence was to establish the existence of a common-law marriage between the infant plaintiff's parents at the time of his birth and thus establish his legitimacy. His counsel agreed that he was not entitled to recover "automatic insurance" benefits as the "child" of Jake Jackson within any of the meanings of the word as variously defined in Section 22 of the War Risk Insurance Act (Act of October 6, 1917, c. 105, 40 Stat. 401; Act of December 24, 1919, c. 16, 41 Stat. 371) unless he could establish his legitimacy (R. 30).

dictional grounds that there was no "legal disagreement" and that the action was barred by the limitation provisions in the Act of July 3, 1930 (amending Section 19 of the World War Veterans' Act, 1924). (R. 28–29.) The motion was overruled and an exception noted. (R. 29.) A verdict was returned for the infant plaintiff (R. 38) and the Government moved the court to set it aside and to grant a new trial upon the ground that the verdict was contrary to the "greater weight" of the evidence and also upon the ground that "automatic insurance was a gratuity" and that the infant plaintiff's "action thereon was barred by the repealing clauses of the Economy Act of 1933". (R. 45.) The motion was denied in an opinion delivered by the trial judge (R. 46–49) holding in effect that the verdict was amply supported by the law and the evidence. He expressed doubt as to his power to consider the point relating to the repeal of the "automatic insurance" provisions of the Economy Act "on motion in arrest of judgment" in view of the fact that it had not been raised at the trial (R. 47), but expressed the opinion nevertheless that the infant plaintiff's right to "automatic insurance" benefits was founded upon contract, and hence could not be rescinded by the repealing clauses in the Economy Act (R. 48–49).

The Government filed exceptions to the denial of its motion upon grounds directed separately to the court's rulings upon each of the points raised

by the motion. (R. 49–50.) Judgment was entered for the infant plaintiff awarding installments of "automatic insurance" benefits in the sum of $25 per month from May 11, 1918, to January 11, 1936, the due date of the installment immediately preceding the trial of the case. (R. 4–6.) A bill of exceptions was settled and filed in due time (R. 6–51), and an appeal on behalf of the Government was duly prayed, allowed, and perfected (R. 54–57). Error was separately assigned to the rulings on the motions for a directed verdict and for a new trial, and each point made by the Government in the court below was covered by a separate assignment. (R. 54–56.) The Government, however, later abandoned all except the two relating to the Economy Act and the alleged common-law marriage, resectively.[3]

The Circuit Court of Appeals, in affirming the judgment, held that the Economy Act was ineffective to repeal the provisions as to "automatic insurance", and that there was substantial evidence

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[3] The other two points, as to lack of disagreement and limitations, respectively, would seem unsupported under the law and the evidence. The "disagreement" necessary to jurisdiction under Section 19 of the World War Veterans' Act, as amended (U. S. C., Title 38, Section 445) was established by the denial of the guardian's claim, and the suit was brought in time under the saving clause in that Section which extends the limitation for suit by an infant until three years after the removal of his disability. *Johnson* v. *United States*, 87 F. (2d) 940 (C. C. A. 8th).

of the existence of the alleged common-law marriage. It is stated in the opinion (R. 62) that although support for the Government's contention that "automatic insurance" was abrogated by the Economy Act is found in *Stephens* v. *United States,* 85 F. (2d) 570 (C. C. A. 6), and in the unreported decision of the District Court for the District of Nebraska in *Luther H. Dill* v. *United States,* this position is untenable "because the intention of Congress to place automatic insurance in the same category as insurance for which application has been made seems to be clearly set out in the Act"; that it was obvious that Congress considered "the induction of the soldier into the service and his disability or death * * * as equivalent to an application for and a grant of insurance", and "accepted the military service as the basis of the contract." Accordingly the court held that the infant plaintiff, as beneficiary, acquired a vested property right by contract to receive the benefits provided in the statute, which was protected from impairment by the Fifth Amendment, citing *Lynch* v. *United States,* 292 U. S. 571.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 17 of the Economy Act of March 20, 1933, was not effective to rescind the infant respondent's right to "automatic insurance" benefits under Section 401, War Risk Insurance Act, as amended;

2. In holding in effect that the infant respondent's right to "automatic insurance" benefits under Section 401 of the War Risk Insurance Act, as amended, was a vested property right founded upon contract and hence protected from impairment by the Fifth Amendment;

3. In holding that there was substantial evidence that the infant respondent was the legitimate son of Jake Jackson;

4. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals is squarely in conflict with a decision of the Circuit Court of Appeals for the Sixth Circuit, and is substantially in conflict with decisions of this Court.

1. The court below held in effect that respondent's right to so-called "automatic insurance" benefits was founded upon a contract and hence could not be rescinded by the provisions in Section 17 of the Economy Act of March 20, 1933, repealing all laws "granting * * * compensation and *other allowances,* pension, disability allowance, * * * and all laws granting or *pertaining to yearly renewable term insurance* * * *." The decision in this respect is clearly in conflict with *Stephens* v. *United States,* 85 F. (2d) 570 (C. C. A. 6th) in which it was held as one of the grounds for denying the plaintiff's right to "automatic insurance" benefits that the statute granting it was repealed by

Section 17 of the Economy Act of March 20, 1933. Indeed, the conflict with this decision and with the unreported decision of the District Court for the District of Nebraska in *Luther H. Dill* v. *United States*[4] on the same point is conceded in the opinion of the court below. (R. 22–24.)

2. Furthermore it is submitted that the court below, in holding, in effect, that the enactment of the provisions for "automatic insurance" in Section 401 of the War Risk Insurance Act, as amended, constituted a contract of insurance entered into between the Government and Jake Jackson, the soldier, ignored the fundamental principle that both mutual assent and valuable consideration are essential elements to the creation of a contract. Mutual assent was obviously lacking since Jake Jackson was dead when the provisions for the payment of "automatic insurance" benefits, on account of his death, were enacted. At the time of his death, May 11, 1918, Section 401 of the War Risk Insurance Act covered only persons who had died or become totally permanently disabled while in active service between April 6, 1917, and 120 days after publication of the insurance contract (Act of October 6, 1917, Appendix, *infra,* pp. 19–20), which occurred October 15, 1917, by the promulgation of Bulletin No. 1 of the Treasury Department (Appendix, *infra,* pp. 21–22). Since Jake Jackson died

[4] The pertinent parts of the opinion in this case appear in the Appendix, *infra*, pp. 22–24.

more than 120 days after such application respondent's right to benefits on account of his death did not arise until Section 401 was amended by the Act of December 24, 1919, *supra* (pp. 3–4), to cover those who had been drafted between April 6, 1917, and November 11, 1918.

It is further submitted that the court below erred in holding in effect that military service, which in Jackson's case and that of many others was compulsory, constituted a consideration sufficient to support a contract binding upon the Government (see *Choate* v. *Trapp,* 224 U. S. 665, 674–675) and was intended by Congress as the consideration for a contract to pay the benefits in question.

Moreover, it could hardly be urged that respondent was a party to the alleged contract in view of the provisions in the statute that the soldier himself "shall be deemed to have applied for and to have been granted insurance."

In short, it is submitted that respondent's rights to benefits under the statute were substantially similar to those of a pensioner or of any other beneficiary of a Governmental gratuity and like the latter were revocable at any time. *Lynch* v. *United States,* 292 U. S. 571, 577; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 122–124.

3. While it is no doubt true that Congress intended to invest "automatic insurance" with some of the attributes of a contract of insurance and

possibly to grant the privilege of bringing suit against the Government upon claims for such insurance,[5] it by no means follows that there was an intention to grant the beneficiaries of such "insurance" vested and irrevocable rights in the absence of the elements essential to a valid binding contract. Indeed, there is a strong presumption against the existence of such an intention under the well settled rule "that grants by the state are to be construed strictly against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language." *Pearsall* v. *Great Northern Ry.,* 161 U. S. 646, 664; *Reichelderfer* v. *Quinn,* 287 U. S. 315, 321. It is submitted that the language of the statute in question is far from clear and unambiguous in this respect, in view of the absence of any provision that the rights granted were irrevocable.

4. Furthermore it is submitted that, in the absence of the elements essential to a contract, Congress lacked the power to make the grant of the benefits in question irrevocable even if it had so intended. Cf. *Pearsall* v. *Great Northern Ry., supra,* p. 667. There is no material difference between the provisions in question and those grant-

[5] The court below cites several cases (R. 62–63) in which it was held or assumed that suit might be brought for "automatic insurance" benefits under the statutory provisions giving a right of action on a claim under a "contract of insurance."

ing pensions or other gratuitous allowances to soldiers. Even if it be assumed that Congress intended that a presumptive contract should arise from the automatic insurance provisions, it would seem wholly unreasonable that vested rights could be thus created by a statutory fiction.

United States v. *Weaver,* 86 F. (2d) 372 (C. C. A. 4th), cited in the opinion of the court below, is distinguishable. In that case, which involved yearly renewable term insurance and not so-called "automatic insurance", the court below held that Congress lacked the power to withdraw by the Economy Act the privilege of applying unpaid compensation to the revival of a policy of insurance lapsed for nonpayment of the premiums, granted by Section 305 of the World War Veterans' Act, 1924 as amended (U. S. C., Title 38, Section 516). The decisive point in that case, however, was that Section 305 had already been incorporated prospectively by reference in the war risk insurance contract itself under the provisions of Bulletin No. 1, Treasury Department (Appendix, *infra,* pp. 21–22), and hence that the rights provided in that section were plainly based on a contract.

5. Furthermore, there would seem to be no doubt that the Congress intended to include the statutory grant of "automatic insurance" benefits among the provisions repealed by Section 17 of the Economy

Act. At the time that Act was passed Congress was fully cognizant of the need of stringent economy (see Committee Report, Appendix, *infra,* p. 22, and *Lynch* v. *United States, supra,* p. 580) and evidently intended to rescind all rights under laws enacted for the benefit of World War veterans except those derived from "converted" insurance policies.[6] It was apparently assumed moreover that there was no difference between the legal status of the gratuitous benefits which had been granted under the previous laws and those derived from outstanding contracts of yearly renewable term insurance. *Lynch* v. *United States, supra,* p. 585.

Under the circumstances it would seem unreasonable to impute an intention to the Congress to exempt "automatic insurance" from a statute which was obviously designed to repeal not only laws granting pensions and other gratuitous allowances but also those under which contracts of insurance were issued. The phrase "other allowances" in Section 17 appears to be sufficiently broad to embrace "automatic insurance" (*Luther H. Dill* v. *United States, supra*), but in any event it cannot be doubted that it is embraced either in that phrase or in the phrase "laws * * * pertaining to yearly renewable term insurance," for otherwise

[6] The term "converted" has been used to describe all forms of insurance issued by the Government subsequent to the original contracts of yearly renewable term insurance. See *United States* v. *Madigan*, No. 562, October Term, 1936.

the manifest intention of Congress would be frustrated.

6. Furthermore, there would seem no room for doubt that Congress intended the repeal to stand as to "automatic insurance" even if it was invalid with reference to yearly renewable term insurance, as was held in *Lynch* v. *United States, supra.* The part of Section 17 repealing the provisions for "automatic insurance" was clearly separable from the portion which repealed the provisions for yearly renewable term insurance. (*Allen* v. *Louisiana,* 103 U. S. 80, 84; *Field* v. *Clark,* 143 U. S. 649, 696; *Loeb* v. *Township Trustees,* 179 U. S. 472, 490; *Berea College* v. *Kentucky,* 211 U. S. 45, 55.) Moreover the provisions for "automatic insurance" and those for yearly renewable term insurance were evidently both regarded as in the same category with laws granting pensions, disability allowances, and other gratuities specifically mentioned in the repealing section. Cf. *Lynch* v. *United States, supra,* p. 585. It would be manifestly unreasonable to impute to Congress an intent to make the repeal of the latter contingent upon the validity of the repeal of laws granting yearly renewable term insurance, and there would seem no reason under the circumstances for imputing a different intention with respect to "automatic insurance" especially in view of the realization on the part of Congress as to the great need of economy.

7. The instant case is one of twenty-eight now in litigation involving the question whether the provisons as to "automatic insurance" were repealed by the Economy Act.

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

JULY 1937.

APPENDIX

The Act of October 6, 1917, c. 105, 40 Stat. 398, 409, 410 (amending the War Risk Insurance Act), provides in part as follows:

> SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000, or more than $10,000, upon the payment of the premiums as hereinafter provided.
>
> SEC. 401. That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service. Any person in the active service on or after the sixth day of

April, nineteen hundred and seventeen, who, while in such service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his wife from the time of his death and during her widowhood, or to his child, or widowed mother if and while they survive him: *Provided, however,* That not more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid; and in that event the amount of the monthly installments shall be apportioned between them as may be provided by regulations.

SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance.

* * *

* * * * * *

SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical ex-

amination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

SEC. 405. That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides. * * *

Bulletin No. 1 (Regulations and Procedure, U. S. Veterans' Bureau (1930) Part II, pp. 1233, 1235) was promulgated by the Director of the Bureau of War Risk Insurance, Treasury Department, on October 15, 1917, and provides, in part, as follows:

> Under the authority granted by Congress in an act amending "An act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department' approved September 2, 1914, and for other purposes", approved October 6, 1917, and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of

> which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract: * * *.

In the House Committee Report (73d Cong., 1st Sess., House Report No. 1, March 11, 1933, p. 1) accompanying the bill which became the Economy Act, it is said:

> The Committee on Economy, to whom was referred the bill (H. R. 2820) to maintain the credit of the United States Government, having considered the same, report favorably thereon with a recommendation that the bill do pass * * * because the immediate evidence of substantial retrenchment necessary to successfully conduct the refunding operation * * * because substantial retrenchment alone can prevent a vicious uncontrolled inflation of the currency * * * evidence of substantial reduction in expenditures alone can restore confidence in the ability of the United States Government to meet its obligations * * * the legislation proposed by the President is necessary * * *.

DISTRICT OF NEBRASKA, LINCOLN DIVISION

LUTHER H. DILL

v.

UNITED STATES OF AMERICA

* * * * *

Decision of Judge Munger

In a case of this kind there must be an insurance policy and that requirement is satisfied by the automatic insurance granted by Congress. There must be a permanent and

total disability during the term of the policy, and plaintiff has offered to prove that. There must be a claim made for the disability and such refusal to grant or act upon the claim as amounts to disagreement under the statute, and suit must be brought within the time limited by the statute.

* * * * *

There is another reason why this suit cannot be maintained. An examination of the *Lynch case* (*Lynch* v. *U. S.*, 292 U. S. 571) shows that the question decided in that case was that a contract of yearly renewable term insurance on which the soldier had paid the premiums was property which the Government could not confiscate by the indirect way of saying that all laws granting or pertaining to yearly renewable term insurance are hereby repealed. I think that clause in the Economy Act does not apply to this insurance policy because it only covers yearly renewable term insurance, and this is not renewable insurance. It was only insurance to last for a few months, until the soldier could apply for and obtain his regular insurance. It was not the intention of Congress in that clause to repeal the laws relating to automatic insurance.

But there is another provision in section 17 of the Economy Act to which Judge Brandeis refers, which reads: "All public laws granting medical or hospital treatment, domiciliary care, compensation, and other allowances, pensions, disability allowances, or retirement pay, etc., are hereby repealed." I am of the opinion that that clause covers automatic insurance, and that no suit can be maintained to recover for automatic insurance since the passage of the Economy Act. In this *Lynch case* it is said: "War-risk in-

surance, while resembling in benevolence pensions, compensation allowances, hospital, and other privileges accorded former members of the Army and Navy or their dependents, differs from them in fundamental and legal incidents. Pensions, compensation, allowances, and privileges are gratuities. They involve no agreement of parties. The granting of them grants no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time under the discretion of Congress." A number of decisions of the Supreme Court are cited, such as *U. S.* against *Teller,* 107 U. S. 64, where it is stated: "No pensioner has a vested legal right to his pension. Pensions are the bounties of Government which Congress has the right to give, withhold, distribute, or recall in its discretion." The Economy Act (48 Stat. 9) declares: "All public laws granting * * * compensation and other allowances, pension disability allowances * * * are hereby repealed." This automatic insurance was in the nature of a gratuity, a pension, a disability allowance. No action may be maintained for automatic insurance since the Economy Act was passed in March 1933. I will direct a verdict for the defendant on these grounds, admitting that the plaintiff has offered sufficiently to prove that he had a total and permanent disability such as is defined in the war-risk statutes beginning on December 28, 1917, and continuing to this day and which will permanently continue.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 199

UNITED STATES OF AMERICA, PETITIONER

v.

BEN B. JACKSON, BY HIS GUARDIAN AD LITEM, ALPHENE W. DOWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court for the Eastern District of South Carolina (R. 46–49) in denying the Government's motion for a new trial is reported in 14 F. Supp. 132. The opinion of the Circuit Court of Appeals is reported in 89 F. (2d) 572 (R. 60–64).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 7, 1937 (R. 64). The petition

for a writ of certiorari was filed July 7, 1937, and was granted October 11, 1937, limited to the first question presented by the petition (R. 66). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The first question presented by the petition for writ of certiorari, to which this Court limited its review in granting certiorari, is:

Whether the provisions for repeal contained in Section 17 of the Economy Act of March 20, 1933, were effective to rescind the right of a beneficiary of so-called "automatic insurance" to benefits which had been granted on account of the death of a soldier by Section 401 of the War Risk Insurance Act, as amended subsequent to the soldier's death.

The decision of this question involves the consideration of the following questions:

(a) Whether the beneficiary's right to "automatic insurance" benefits was founded upon contract.

(b) Whether the right, if not contractual, was nevertheless a vested property right protected from rescission by the Fifth Amendment.

(c) Whether Congress intended the provisions for repeal in Section 17 of the Economy Act to be effective as a rescission of rights to "automatic insurance" benefits if the Act was void in so far as it purported

to rescind rights under contracts of yearly renewable (war risk) term insurance.

STATUTES AND REGULATIONS INVOLVED

Section 401 of the War Risk Insurance Act as amended December 24, 1919, c. 16, 41 Stat. 371, 374–375, provides in part:

> Any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before the expiration of one hundred and twenty days after October 15, 1917, or one hundred and twenty days after entrance into or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each; and any person inducted into the service by a local draft board after the 6th day of April 1917 and before the 11th day of November 1918, who, while in such service, and before being accepted and enrolled for active military or naval service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such

monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his widow from the time of his death and during her widowhood; or if there is no widow surviving him, then to his child or children; or if there is no child surviving him, then to his mother; or if there be no mother surviving him, then to his father, if and while they survive him: *Provided, however,* That no more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid. The amount of the monthly installments shall be apportioned between children as may be provided by regulations: * * *

Section 17 of the Act of March 20, 1933, c. 3, 48 Stat. 8, 11, known as the Economy Act, provides in part:

All public laws granting medical or hospital treatment, domiciliary care, compensation, and *other allowances,* pension, disability allowance, or retirement pay to veterans and the dependents of veterans of * * * the World War * * * are hereby repealed, and all laws granting or *pertaining to yearly renewable term insurance* are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted. The Administrator of Veterans' Affairs un-

> der the general direction of the President shall immediately cause to be reviewed all allowed claims under the above referred to laws, and where a person is found entitled under this Act, authorize payment or allowance of benefits in accordance with the provisions of this Act commencing with the first day of the fourth calendar month following the month during which this Act is enacted, and notwithstanding the provisions of section 9 of this Act, no further claim in such cases shall be required: *Provided,* That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending. * * * [Italics ours.]

The other pertinent statutory provisions, committee report and regulations involved, together with a letter from the Administrator of Veterans' Affairs and parts of an unreported opinion of a District Court, are set forth in the Appendix.

STATEMENT

Ben B. Jackson, the respondent, an infant, brought this suit through his guardian in the District Court of the United States for the Eastern

District of South Carolina on October 14, 1935, to recover so-called "automatic insurance" benefits of $25 per month under Section 401 of the War Risk Insurance Act, as amended, by reason of the death of Jake Jackson, who had been drafted into the military service of the United States on April 27, 1918, and had died two weeks later on May 11, without having applied for war risk insurance. It was alleged in the complaint (R. 1–3) that respondent was the only child of Jake Jackson, and that there was a disagreement with the Veterans' Administration as to his claim. The Government's answer contained a general denial of all of the allegations in the complaint except those as to the military service and death of Jake Jackson, and a specific denial that respondent was his child, and set up as a separate defense that the suit was barred by the Federal statutes of limitations (R. 3–4).

At the trial before a jury it was established that the respondent's mother died in 1932 (R. 15, 18) and that in 1935 a claim for "automatic insurance" benefits was filed by the respondent's guardian on his behalf and was denied by the Veterans' Administration (R. 9–11). The rest of the evidence related to the question of respondent's legitimacy (R. 12–28).

At the close of the case the Government made a motion for a directed verdict, which was denied (R. 28–29), and excepted to certain portions of the trial court's charge to the jury (R. 36, 37). The

motion and the exceptions related to the jurisdiction of the court on limitations and "disagreement" grounds, or the legitimacy of respondent.[1] The jury rendered a verdict for respondent. (R. 38).

The question to which this Court has limited its grant of the writ of certiorari was raised by the Government's motion for a new trial, one of the grounds of which was that "automatic insurance was a gratuity" and that the respondent's "action thereon was barred by the repealing clauses of the Economy Act of 1933" (R. 45). The motion was denied in an opinion delivered by the trial judge (R. 46–49). He expressed doubt as to his power to consider the point relating to the repeal of the "automatic insurance" provisions by the Economy Act "on motion in arrest of judgment" in view of the fact that it had not been raised at the trial (R. 47), but expressed the opinion, nevertheless, that respondent's right to "automatic insurance" benefits was to be treated as though upon a policy or contract of insurance, and hence could not be rescinded by the repealing clauses in the Economy Act (R. 48–49). The Government expressly ex-

[1] The question as to the legitimacy of the respondent is not now involved in view of the fact that this Court, in granting certiorari, limited its review to the first question presented by the petition.

The questions as to the jurisdiction of the District Court on limitations and "disagreement" grounds were later abandoned as lacking merit. See petition for writ of certiorari, footnote 3, p. 9.

cepted to the ruling of the court that the suit was not barred by the repealing clauses of the Economy Act. (R. 49–50).[2] Judgment was entered for the respondent awarding installments of "automatic insurance" benefits in the sum of $25 per month from May 11, 1918, the date of Jake Jackson's death, to January 11, 1936, the due date of the installment immediately preceding the trial of the case (R. 4–6). A bill of exceptions was settled and filed in due time (R. 6–51), and an appeal on behalf of the Government was duly prayed, allowed, and perfected (R. 54–57). Error was expressly assigned by the Government to the ruling of the court that the respondent was entitled to maintain the suit despite the repealing clauses of

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[2] This question was clearly reviewable by the Circuit Court of Appeals. The motion for a new trial (R. 45) by which the point was first raised in the trial court as to the effect of the Economy Act upon rights to "automatic insurance" was considered by the court as a motion in arrest of judgment (R. 47). Furthermore, the question here could have been properly raised for the first time on appeal, since it involves the repeal of a governing statute (*Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751) and goes to the respondent's failure to state a cause of action as affirmatively shown by the allegations in his complaint. *Slacum* v. *Pomery*, 6 Cranch 221, 224; *U. S. Fidelity & Guaranty Co.* v. *Whitaker*, 8 F. (2d) 455, 457 (C. C. A. 9th); *Griggs* v. *Nadeau*, 221 Fed. 381 (C. C. A. 8th); *United Firemen's Ins. Co.* v. *Jose Rivera Soler & Co.*, 81 F. (2d) 385, 386 (C. C. A. 1st). See also *Craig* v. *Lovell*, 109 U. S. 194; *Chase* v. *United States*, 256 U. S. 1; *Watts* v. *Waddle*, 6 Pet. 389, 402; *Schooner Peggy*, 1 Cranch 103, 110; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *United States* v. *Heinzman & Co.*, 206 U. S. 370.

the Economy Act. (See Assignments 1 and 6, R. 54, 55.)

In affirming the judgment below, the Circuit Court of Appeals held that the repealing clauses in Section 17 of the Economy Act were ineffective to rescind the provisions as to "automatic insurance" contained in Section 401 of the War Risk Insurance Act, as amended. It is stated in the opinion (R. 62) that although support for the Government's contention that "automatic insurance" was abrogated by the Economy Act is found in *Stephens* v. *United States*, 85 F. (2d) 570 (C. C. A. 6th), and in the unreported decision of the District Court for the District of Nebraska in *Luther H. Dill* v. *United States*, this position is untenable—

> because the intention of Congress to place automatic insurance in the same category as insurance for which application has been made seems to be clearly set out in the Act. * * *
>
> It is obvious that Congress chose to consider the induction of the soldier into the service and his disability or death within 120 days thereafter as equivalent to an application for and a grant of insurance, so that a contract of insurance of equal validity to those for which application should be made would come into existence; and since Congress accepted the military service as the basis of the contract, it is of no moment that no written document was issued to the soldier or that no premium for the brief period of 120 days was required.

Accordingly the court held, in effect, that the respondent, as beneficiary, acquired a vested property right by contract to receive the benefits provided in the statute, which was protected from impairment by the Fifth Amendment, citing *Lynch v. United States,* 292 U. S. 571.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 17 of the Economy Act of March 20, 1933, was not effective to rescind the infant respondent's right to "automatic insurance" benefits under Section 401, War Risk Insurance Act, as amended.

2. In holding in effect that the infant respondent's right to "automatic insurance" benefits under Section 401 of the War Risk Insurance Act, as amended, was a vested property right founded upon contract and hence protected from impairment by the Fifth Amendment;

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

I

It is submitted that the statutory grant of so-called "automatic insurance" to respondent was revocable by Congress at any time without payment of compensation under the Fifth Amendment. In holding that the grant of such benefits was not subject to repeal by Section 17 of the

Economy Act, the courts below relied upon *Lynch* v. *United States,* 292 U. S. 571. That case, however, involves policies of war risk insurance, and in holding that they were contracts creating vested rights protected by the Fifth Amendment it was pointed out by this Court that such contracts differ from pensions, compensation allowances, hospital, and other privileges granted by the War Risk Insurance Act, because the latter were mere gratuities, involving no agreement of the parties and creating no vested rights; hence, the benefits conferred by them might be redistributed or withdrawn at any time in the discretion of Congress.

The benefits which respondent seeks to recover were not founded on contract but were gratuities. They were granted as part of a legislative program, wholly benevolent in purpose, which included family and compensation allowances and provisions for granting war risk insurance. War risk insurance was granted on application in the form of a contract which required the payment of premiums as consideration for the Government's obligation. The grant of "automatic insurance," on the other hand, required no application, consideration or form embodying its terms. The rule is well settled that statutes, claimed to restrict the power of Government by the granting of private rights, are to be strictly construed against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language, the presumption being that such a law

is not intended to create private contractual or vested rights but merely to declare a policy to be pursued until the Legislature shall ordain otherwise. There is nothing in the Act here sufficient to overcome this presumption. The so-called "contract of insurance," held by the court below to have been created by the statute, was expressly based upon a presumption, admittedly contrary to fact, that the veteran had applied for and had been granted insurance. This deliberate resort to a fictitious contract would seem sufficient alone to show an absence of intention to enter into an actual contract. Moreover, there is strong additional evidence that there was no intention to bind the Government by an irrevocable obligation to pay the benefits in question, in the fact that the grant included not only persons who lacked the opportunity to obtain war risk insurance, but also those whose failure to apply for such insurance was entirely voluntary.

Furthermore, in cases like the one at bar, where the soldier had died, the beneficiary, if held to have a vested right, would be in a better position than beneficiaries of war risk insurance contracts whose rights to benefits, even after the death of the insured, are subject to redistribution by Congress as to unaccrued installments. Manifestly, no such preference was intended. Since there could thus have been no intention to contract with beneficiaries of deceased soldiers, there was plainly no intention to contract with soldiers who were alive.

It is submitted that the sole purpose of presuming an application for and grant of insurance was merely to confer benefits similar in some respects to those which would have been received if contracts of insurance had been obtained. The Government's position here is thus reconcilable with the cases in which statutory provisions giving the privilege of suing the United States on claims under a "contract of insurance", and other provisions regarded as applicable to war risk insurance, were held or assumed to be applicable to "automatic insurance."

Furthermore, sufficient consideration was wanting to support a contract if one had been intended. The court below held that military service was the consideration. But military service in time of war is insufficient consideration to support a contract, since it is merely the performance by the soldier of his legal duty as a citizen to defend his country when the necessity arises.

II

It is submitted that the statutory grant of "automatic insurance" benefits to respondent was revoked by Section 17 of the Economy Act of March 20, 1933. There would seem no doubt that Congress intended to include the grant among those repealed by Section 17 of the Economy Act of March 20, 1933. The urgent need for stringent economy was fully recognized, and the Act was designed to meet that need with a program affecting the benefits and

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privileges granted under prior Acts to all war veterans and their dependents and to certain other persons, the grant of which was regarded as gratuitous. Those granted World War veterans and certain others, with few exceptions, were sought to be rescinded, and the President was authorized within limits to set up a new and presumably more economical system of benefits. There would, therefore, seem no reason for doubting that the broad language of the statute was intended to repeal the gratuitous grant of "automatic insurance" benefits.

Furthermore, the repeal of the statutes granting "automatic insurance" was not affected by the invalidity of the Act in so far as it purported to repeal those granting yearly renewable term insurance. The repealing provisions were entirely separable in substance. Moreover, it is clear that Congress intended the repeal of the provisions for "automatic insurance" to stand regardless of the validity of the attempted repeal of those for yearly renewable term insurance. For all of the benefits and privileges sought to be affected were regarded as gratuities and hence revocable, and in view of the urgent need for economy it is reasonable to infer that Congress did not intend to allow the possible failure of its attempt to repeal yearly renewable term insurance to defeat the principal purpose of the Act in whole or in part, especially in view of the fact that the President was granted powers which would permit him to make adjust-

ments to off-set any failure of the Act with respect to the economies intended.

Furthermore, there would seem no more reason why Congress should have intended the repeal of the provisions for "automatic insurance" to be any more dependent upon the repeal of those for yearly renewable term insurance than the provisions repealing the other benefits and privileges. Previous legislation shows that "automatic insurance" has been consistently regarded with less favor than yearly renewable term insurance as indicated by the fact that there have been more restrictions in regard to beneficiaries of the former than of the latter, and less liberality as to the periods within which the respective rights to each were available. Moreover, recent extensions of the period of limitations on suits upon claims for insurance against the Government have been held to omit claims for "automatic insurance." The unequal treatment accorded by the Economy Act to other classes of persons whose rights were affected shows that Congress was intent upon carrying out its purpose of stringent economy without regard to equality of treatment. As stated in the opinion of the court below, the Government's contention here that "automatic insurance" was abrogated by the Economy Act is supported by *Stephens* v. *United States,* 85 F. (2d) 570 (C. C. A. 6th), and the unreported decision of the District Court for the District of Nebraska in *Luther H. Dill* v. *United States.*

The fact that payments have been made of claims for "automatic insurance" since the passage of the Economy Act furnishes no support for respondent's position, since it is evident that some of these payments were made under provisions which related solely to yearly renewable term insurance and the other payments were based upon a misinterpretation of this Court's decision in *Lynch* v. *United States, supra.*

III

Any privilege which may have existed to sue the United States for "automatic insurance" benefits sought by the respondent has in effect been revoked by the repeal of the provisions for such benefits in Section 17 of the Economy Act. If such privilege ever existed under the statutory provisions giving such a privilege on a claim under a "contract of insurance," it was based upon a fiction of a contract arising from the provisions granting "automatic insurance." The repeal of these provisions destroyed the fiction, which was the basis of the privilege, and hence the privilege ceased to exist. We believe that the Tucker Act would be inapplicable. In any event, it is manifest that jurisdiction was not asserted under that Act since the case was tried before a jury. Therefore, it would seem unnecessary to consider whether the suit might have been brought under that Act.

ARGUMENT

I

THE GRANT OF BENEFITS TO RESPONDENT IN SECTION 401 OF THE WAR RISK INSURANCE ACT, AS AMENDED, WAS REVOCABLE BY CONGRESS AT ANY TIME WITHOUT PAYMENT OF COMPENSATION UNDER THE FIFTH AMENDMENT

In holding that the statutory grant of benefits provided in Section 401 of the War Risk Insurance Act, as amended, known as "automatic insurance,"[1] was not subject to repeal by Section 17 of the Economy Act, the courts below relied upon the decision of this Court in *Lynch* v. *United States,* 292 U. S. 571. In that case, however, this Court was dealing with policies of war risk insurance issued under Sections 400–403 of the War Risk Insurance Act, as amended, and held that as these were contracts and therefore created vested rights, they could not, because of the Fifth Amendment, be abrogated under Section 17 of the Economy Act without payment of just compensation. In so holding the Court pointed out that policies of war risk insurance differed from pensions, compensation allowances, hospital, and other privileges granted by the War Risk Insurance Act, because

[1] These benefits were designated as "automatic insurance" by Congress. Public Resolution No. 22, 65th Congress, approved February 12, 1918, c. 17, 40 Stat. 438; Act of June 25, 1918, c. 104, sec. 20, 40 Stat. 609, 615.

the latter were mere gratuities. The Court said (p. 577):

> They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. *United States* v. *Teller,* 107 U. S. 64, 68; *Frisbie* v. *United States,* 157 U. S. 160, 166; *United States* v. *Cook,* 257 U. S. 523, 527.

See also *Walton* v. *Cotton,* 19 How. 355, 357–358; *Pennie* v. *Reis,* 132 U. S. 464; *United States* v. *Hall,* 98 U. S. 343, 358; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 122–124; *Dodge* v. *Board of Education of Chicago,* No. 5, October Term, 1937, decided November 8, 1937.

We submit that the benefits which respondent seeks to recover were not founded upon contract, but were gratuities, and therefore subject to revocation by Congress at any time, without payment of compensation under the Fifth Amendment.

The provisions in question were part of a legislative program wholly benevolent in purpose which was enacted into law by the War Risk Insurance Act of October 6, 1917. *Lynch* v. *United States, supra,* p. 576. Article I of the Act contained provisions for administration, appropriations of money, definitions of terms, and certain penalties; Article II provided for compulsory allotments by soldiers for the support of their families and for supplementing such allotments by allowances from

the Government; Article III provided for the payment of "compensation" for death or disability; Article IV provided for the granting of war risk insurance and for the payment of the benefits in question here.

War risk insurance was granted upon application in the form of a contract which required as a consideration for the Government's obligation that the insured pay prescribed monthly premiums. See Treasury Bulletin No. 1, *infra*, p. 65.

The grant of "automatic insurance," on the other hand, contained no provisions for application, consideration, or form embodying its terms. Section 401 of the War Risk Insurance Act, as amended (*supra*, p. 3), containing it, provided that any person in service who "becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance," within certain limited periods of time "shall be deemed to have applied for and to have been granted insurance" payable in monthly installments of $25 each "to such person during his life," and, in the event of his death, to certain surviving relatives in the order named in the statute, but not to exceed 240 installments, including any paid to the veteran.[4]

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[4] Jake Jackson was dead when the provisions applicable to him were enacted. At the time of his death, May 11, 1918, Section 401 of the War Risk Insurance Act covered only persons who had died or become totally permanently disabled while in active service between April 6, 1917, and 120 days after publication of the insurance contract (Act of

The rule is well settled that statutes claimed to restrict the power of government by the granting of private rights are to be strictly construed against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language. *Pearsall* v. *Great Northern Railway,* 161 U. S. 646, 664; *Reichelderfer* v. *Quinn,* 287 U. S. 315, 321. In *Dodge* v. *Board of Education of Chicago, supra,* it is said:

> The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.

See also *Rector &c. of Christ Church* v. *County of Philadelphia,* 24 How. 300, 302; *Tucker* v. *Ferguson,* 22 Wall. 527, 575; *New Jersey* v. *Yard,* 95 U. S. 104; *Newton* v. *Commissioners,* 100 U. S. 548, 561; *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 387.

October 6, 1917, *infra*, p. 62), which occurred October 15, 1917, by the promulgation of Bulletin No. 1 of the Treasury Department (*infra*, p. 65). Since Jake Jackson died on May 11, 1918, more than 120 days after such publication, no right to benefits on account of his death arose until Section 401 was amended by the Act of December 24, 1919 (*supra*, p. 3), to cover those who between April 6, 1917, and November 11, 1918, became totally and permanently disabled or died while in active service, and prior to 120 days after entry into such service, or became so disabled or died after being drafted and before being accepted for active service.

There is nothing in the Act here which is sufficient to overcome the presumption that the provisions for monthly payments of the benefits in question was merely a declaration of a policy to be pursued until Congress should decide otherwise and did not create an obligation by contract to continue such payments. There is no language expressing an intention to enter into a contract nor may such an intent be implied.

The court below held that Congress considered the induction of a soldier into the service and his disability or death thereafter, as equivalent to an application for and a grant of insurance, and accepted his military service as the basis for the contract, "so that a contract of insurance of equal validity to those for which application should be made would come into existence (R. 62); * * *." This so-called "contract of insurance," however, was expressly based upon a presumption, admittedly contrary to fact, that the soldier had applied for and had been granted insurance, and hence was only a fiction and obviously was intended to be nothing more. The fact that Congress thus deliberately resorted to a fictitious contract in granting the benefits in question would seem sufficient alone to show that there was no intention to enter into an actual contract. Moreover, the fact that the grant included not only persons who lacked the opportunity to obtain war risk insurance, but also those whose failure to apply for such insurance was entirely

voluntary, constitutes additional and most persuasive evidence that there was no intention of binding the Government by an irrevocable obligation to pay the monthly installments of the benefits in question. Furthermore, in cases like the one at bar, where the soldier had died and a contract, if made, would necessarily have been with the beneficiary, such a contract, if giving the beneficiary vested rights to the benefits in question, would place him in a better position than beneficiaries of war risk insurance contracts who have no vested right even after the death of the insured as against a redistribution by Congress of unaccrued benefit installments payable under the policy. *White* v. *United States*, 270 U. S. 175. Manifestly Congress had no intention of making such a preference. Since, therefore, there could have been no intention to enter into contracts as to the benefit in question with the beneficiaries of deceased soldiers, there was plainly no intention to contract with disabled soldiers who were alive when the Act was passed.

It is submitted that the sole purpose of presuming the application for and grant of insurance was not to create rights by contract but merely to confer benefits similar in some respects to those which would have been received if contracts of insurance had been obtained. The Government's position here is thus reconcilable with the decisions cited by the court below (R. 63) and by respondent in his brief in opposition (p. 5), which hold or assume that suit might be brought for "automatic insur-

ance" benefits under the statutory provisions giving a right of action upon a claim under a "contract of insurance," and two of which (*United States* v. *Carlson,* 44 F. (2d) 5 (C. C. A. 9th) and *Caprio* v. *United States,* 45 F. (2d) 520 (C. C. A. 1st)) hold that a statutory presumption regarded by the court as part of the war risk term insurance contract was intended also to be applicable to "automatic insurance."

Furthermore, sufficient consideration was wanting to support a contract if one had been intended. The court below held, in effect, that Congress accepted military service as the consideration. (R. 62.) But it is submitted that military service in war time is insufficient consideration to support a grant of benefits to soldiers as a contract. In performing such service the soldier is only doing his duty as a citizen. In *Selective Draft Law Cases,* 245 U. S. 366, 378, it is said:

> It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, Law of Nations, Book III, c. 1 & 2.

And in *United States* v. *Schwimmer,* 279 U. S. 644, 650, it is said:

> That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

In the *Restatement of the Law of Contracts* of the American Law Institute, Section 76, it is said in effect that an act "required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promissor or to the public" is not sufficient consideration for a unilateral contract. Accord: *Williston, Contracts,* Vol. I, Sec. 132 (1936 ed.).

United States v. *Weaver,* 86 F. (2d) 372 (C. C. A. 4th), cited in the opinion of the court below, is distinguishable. In that case, which involved yearly renewable term insurance and not "automatic insurance," the court below held that Congress lacked the power to withdraw by the Economy Act of March 20, 1933 (*infra,* p. 70), the privilege of applying unpaid compensation allowances to the revival of a policy of insurance lapsed for nonpayment of the premiums, granted by Section 305 of the World War Veterans' Act, 1924, as amended (U. S. C., Title 38, Section 516). The decisive point in that case, however, was that Section 305 had already been incorporated prospectively by reference in the war risk insurance contract itself under the provisions of Bulletin No. 1, Treasury Department (*infra,* p. 65), and hence that the rights provided in that section were plainly based on a contract.

II

THE STATUTORY GRANT OF "AUTOMATIC INSURANCE" BENEFITS TO RESPONDENT WAS REVOKED BY SECTION 17 OF THE ECONOMY ACT OF MARCH 20, 1933

There would seem no doubt that Congress intended to include the statutory grant of "automatic insurance" benefits among those repealed by Section 17 of the Economy Act of March 20, 1933 (*supra*, p. 4). This section provided, in part, that all "public laws granting medical or hospital treatment, domiciliary care, compensation and other allowances, pension, disability allowance, or retirement pay to veterans and the dependents of veterans of * * * [certain wars, including] the World War, * * * are hereby repealed, and all laws granting or pertaining to yearly renewable term insurance are hereby repealed, * * *." Congress was fully cognizant of the urgent need for stringent economy (see Committee Report, *infra*, p. 77, and *Lynch* v. *United States*, 292, U. S. 571, 580) and the Act was designed to meet that need with a program affecting the benefits and privileges granted gratuitously under prior Acts to all war veterans and their dependents, and other former members of the military and naval services.

As to the veterans and their dependents of certain wars, including the World War, and certain other former members of the military and naval

services, this purpose was sought to be accomplished by repealing under Section 17 (with saving clauses not deemed applicable here) all laws gratuitously granting to them various benefits and privileges, and by authorizing the President, within certain limits, to set up a new and presumably more economical system of benefits (Sections 1–4, 6, *infra*, pp. 70–73). Rights under "converted" insurance policies[8] were not affected. Laws granting yearly renewable term insurance were, however, included among the laws repealed by Section 17 apparently upon the assumption (subsequently held to be erroneous in *Lynch* v. *United States, supra*) that there was no difference between the legal status of rights under the outstanding contracts of such insurance and rights to pensions, compensation allowances, and other gratuities (*Lynch* v. *United States, supra*, pp. 585, 586–587), which were subject to be withdrawn at any time in the discretion of Congress.

In view of the recognition by Congress of the great need of economy and the comprehensive scope of the repealing provisions in a statute obviously designed to repeal not only laws under which term insurance was issued, but all laws granting gratuities, there would seem to be no reason for doubting that Congress intended to repeal

[8] The term "converted" has been used to describe all forms of insurance issued by the Government subsequent to the original contracts of yearly renewable term insurance. See *United States* v. *Madigan*, 300 U. S. 500, 503.

the provisions relating to "automatic insurance." If the manifested intention of Congress to repeal all grautities requires specific language to effectuate that intention as to "automatic insurance," it may be found either in the phrase "other allowances" (*Luther H. Dill* v. *United States* (D. C. Nebr.) *supra,* unreported)* or since "automatic insurance" was granted in lieu of yearly renewable term insurance, in the phrase "laws * * * *pertaining to* yearly renewable term insurance."

Furthermore, the repeal of the provisions for "automatic insurance" was not affected by the fact that Section 17 was invalid in so far as it purported to repeal laws granting yearly renewable term insurance, as was held in *Lynch* v. *United States, supra.* The rule is well established by decisions of this Court that a statute invalid in part is not necessarily void in its entirety; that the test to be applied is whether the part within the power of the legislature to enact is separable from that which is not, and whether the legislature intended the former to stand, if the latter should fall. (*Allen* v. *Louisiana,* 103 U. S. 80, 83–84; *Field* v. *Clark,* 143 U. S. 649, 696; *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362, 395–396; *Loeb* v. *Columbia Township Trustees,* 179 U. S. 472, 490; *Berea College* v. *Kentucky,* 211 U. S. 45, 54–56; *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 234; *Lynch*

* The pertinent parts of the opinion in this case appear in the Appendix, *infra,* pp. 78–80.

v. *United States, supra,* p. 586). Moreover, the test as to separability is not whether the parts under consideration are contained in the same section, as in the instant case, "but whether they are essentially and inseparably connected in substance * * * so interdependent that one cannot operate without the other." *Loeb* v. *Columbia Township Trustees, supra,* p. 590; *Berea College* v. *Kentucky, supra,* pp. 55–56. It is submitted that neither the repeal of the provisions for "automatic insurance" nor the repeal of any of the provisions for the other gratuities in Section 17, have any essential or inseparable connection in substance with the repeal of the provisions for yearly renewable term insurance. While it is true that "automatic insurance" was granted in lieu of yearly renewable term insurance, this could hardly be considered a connection so inseparable that repeal of the provisions as to "automatic insurance" benefits could not be operative without the repeal of those as to yearly renewable term insurance.

Moreover, it would seem equally clear that Congress intended the repeal of the provisions for "automatic insurance" to stand irrespective of whether the attempted repeal of those for yearly renewable term insurance was valid.

As previously stated, all of the rights and privileges affected by the repealing provisions in Section 17 were regarded as gratuities, and hence as revocable. Moreover, the need of stringent economy

was urgent. Under the circumstances it is reasonable to infer that Congress would prefer to realize a part of the projected economies, rather than having them fail completely, and did not intend to allow the possible failure of the repealing provisions as to rights under contracts of yearly renewable term insurance to operate to prevent the accomplishment of the principal purpose of the Act in whole or in part. And this is especially true in view of the fact that Sections 1–4 and 6 (*infra*, pp. 70–73) granted the President the power, within certain limits, to prescribe the rates of pensions, the nature and periods of service, and the degrees of disability for which they should be paid, and the extent of the domiciliary care to be provided, which would permit him to make adjustments directed to offsetting any failure of the Act with respect to the economies intended.

Furthermore, there would seem to be no more reason why Congress should have intended the repeal of the provisions as to "automatic insurance" to be any more dependent upon the repeal of the provisions as to yearly renewable term insurance than the provisions repealing compensation, domiciliary care, and other benefits. An examination of certain previous Acts shows clearly that Congress from the beginning has regarded "automatic insurance" with less favor than yearly renewable term insurance, possibly because of the fact that premiums were required for the latter but not for

the former. Moreover, the fact that "automatic insurance" was granted to persons who had voluntarily refused to apply for term insurance may have also been a factor. In any event, distinctions have consistently been made between the two types of benefits, both as to classes and designation of beneficiaries and the periods within which they were available. From the beginning Section 402 has provided for a more numerous class of beneficiaries of term insurance than was provided in Section 401 for "automatic insurance." Moreover, the insured, under the former, was given the right to designate the beneficiary or beneficiaries within a permitted class and to change such designation at will. The beneficiaries of "automatic insurance" on the other hand were designated by the statute.[1]

As to the distinctions made with regard to the periods within which term insurance and "automatic insurance" were available, the original Act

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[1] The beneficiaries provided in Section 402 of the original Act (*infra*, p. 62) for term insurance, were "a spouse, child, grandchild, parent, brother, or sister." Those designated in Section 401 (*infra*, pp. 61–62) were a widow during widowhood, child or widowed mother only. The Act of June 25, 1918, c. 104, Section 19 (*infra*, p. 67), eliminated widowhood of mothers as a condition to their eligibility for "automatic insurance" benefits and added fathers to the class of those entitled in the order named in the Act. No other changes were made then or later in this respect. In the case of war risk term insurance, however, uncles, aunts, nephews, nieces and brothers and sisters-in-law were subsequently added to the permitted class of beneficiaries by the Act of December 24, 1919, c. 16, Section 13, 41 Stat. 371, 375 (*infra*, p. 69).

(Act of October 6, 1917, *infra*, pp. 61–62) limited "automatic insurance" to persons who died or became totally and permanently disabled before the expiration of 120 days from the publication of the terms and conditions of the insurance contract, i. e., October 15, 1917, when such publication was made in the form of Treasury Bulletin No. 1 (*infra*, p. 65). The same Act permitted applications for term insurance within 120 days after such publication or after entrance into active service. This distinction between the periods for "automatic insurance" and application for term insurance was eliminated by the Act of December 24, 1919 (*infra*, p. 67), but Public Resolution No. 22, 65th Congress, approved February 12, 1918 (*infra*, p. 66) extending to April 12, 1918, the time within which an application for term insurance might be made, specifically excluded "automatic insurance" from the extension thus provided, and no further extension was ever granted as to the latter.

Another instance of the fact that Congress regarded "automatic insurance" with less favor than contracts of yearly renewable term insurance appears in the Act of July 3, 1930, c. 849, Sec. 4, 46 Stat. 991, 992 (*infra*, p. 70), which extended the period of limitations on suits under contracts of war risk term and "converted" insurance, but not for the suits to recover "automatic insurance" benefits. See *United States* v. *Preece*, 85 F. (2d) 952 (C. C. A. 10th), certiorari denied, 300 U. S.

660; petition for rehearing denied, 300 U. S. 687; *United States* v. *Pastell*, 91 F. (2d) 575 (C. C. A. 4th). In the opinion of the Circuit Court of Appeals for the Fourth Circuit in the *Pastell* case, the difference in the treatment accorded by Congress to yearly renewable term insurance and "automatic insurance" is demonstrated by an exhaustive review of the applicable statutes.

Furthermore, there is no reason for assuming that Congress intended to avoid any inequality of treatment as between beneficiaries of "automatic insurance" and those of term insurance which might have been deemed to result if the repeal should stand as to "automatic insurance" though void as to term insurance, for the unequal treatment accorded by the Economy Act to other classes of persons whose rights were affected shows that Congress was intent upon carrying out its purpose of stringent economy without regard to equality of treatment. This is apparent from the inequality of treatment which is evidently accorded widows and children of veterans of the World War and those of veterans of other wars.[8]

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[8] Section 1 of the Act containing the provisions for pensions in lieu of the rights and privileges rescinded by the repealing clauses in Section 17, provided that a pension might be paid to any person disabled as a result of disease or injury incurred or aggravated in line of duty during active service, whether or not in time of war (subsection (a)), and to any of the veterans covered by the Act who were permanently disabled *irrespective of whether the disability was connected with his service* (sub-section (b)). Moreover, the widow or child of any of such veterans, *ex-*

In view of the fact that thus apparently no provision was made to avoid unequal treatment as between a class of beneficiaries which included those of term insurance as well as those of "automatic insurance," on the one hand, and other classes of persons affected, there would seem to be no reason for assuming that Congress intended to avoid inequality of treatment as between beneficiaries of "automatic insurance" and those of term insurance.

As stated in the opinion of the court below (R. 62), the Government's contention here that "automatic insurance" was abrogated by the Economy Act is supported by *Stephens* v. *United States,* 85 F. (2d) 570 (C. C. A. 6th) and the unreported decision of the District Court for the District of Nebraska in *Luther H. Dill* v. *United States.*[9] It was held in the *Stephens* case, as one of the grounds

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cept veterans of the World War, was also eligible to receive a pension, *irrespective of whether the veteran's death was connected with his service* (sub-section (d)). A widow or child of a World War veteran, however, was eligible for a pension only under sub-section (c), which was limited to cases where death resulted from disease or injury incurred or aggravated in line of duty during active service. Consequently one of the effects intended by the Act, by virtue of the provisions of Sections 1 and 17, was not only to render a widow or child of a World War veteran, whose death was not connected with his service, ineligible to receive a pension but also to deprive such widow or child of any rights he or she might have either to "automatic insurance" or yearly renewable term insurance benefits except such as were preserved by the saving clause in Section 17.

[9] The pertinent parts of the opinion in this case appear, (*infra*, p. 78).

for denying the plaintiff's recovery of "automatic insurance" benefits, that the statute granting them was repealed by Section 17 of the Economy Act. The decision in the *Dill* case is to the same effect.

The fact, to which respondent refers in his brief in opposition (p. 6), that payments have been made of claims for "automatic insurance" since the passage of the Economy Act furnishes no support for his position. It is evident from the letter of the Administrator of Veterans' Affairs to the Solicitor General (*infra,* p. 80) that the payments made prior to the decision of this Court in *Lynch* v. *United States, supra,* and those made subsequent to the decision of the Circuit Court of Appeals for the Sixth Circuit in *Stephens* v. *United States, supra,* were based upon the saving clause in Section 17 of the Economy Act and subsequent Acts restoring certain insurance benefits which Congress had sought to rescind under the repealing clauses of Section 17.[10] But these statutory provisions, in so far as they purported to affect "insur-

[10] Section 17 contained a clause saving rights to benefits "under contracts of yearly renewable term insurance," payment of which had been commenced or which had been awarded by judgments already rendered, or to be rendered in pending suits, *supra*, p. 5.

Act of June 16, 1933, c. 101, § 20, 48 Stat. 309, provides:

"* * * Notwithstanding the provisions of section 17, title 1, Public Numbered 2, Seventy-third Congress, any claim for yearly renewable term insurance on which premiums were paid to the date of death of the insured and any claim for pension, compensation allowance, or emergency officers' retirement pay under the provisions of laws repealed

ance," related to yearly renewable term insurance only, in plain and unambiguous terms, the meaning of which may not be altered by administrative practice inconsistent with it. (*Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, 640; *Miller* v. *United States,* 294 U. S. 435, 439–440, rehearing denied, 294 U. S. 734. And compare, *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315; *Alaska Steamship Co.* v. *United States,* 290 U. S. 256, 264.) Moreover, payments made be-

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by said section 17 wherein claim was duly filed prior to March 20, 1933, may be adjudicated by the Veterans' Administration on the proofs and evidence received by the Veterans' Administration prior to March 20, 1933, and any person found entitled to the benefits claimed shall be paid such benefits in accordance with and in the amounts provided by such prior laws: * * *."

Section 35 of the Independent Offices Appropriation Act of 1935, passed on March 27–28, 1934, over the President's veto, c. 102, 48 Stat. 526, provides:

"That notwithstanding the provisions of Section 17 of title 1, of an Act entitled 'An Act to maintain the Credit of the United States Government' approved March 20, 1933, and section 20 of an Act entitled 'An Act making appropriations for the Executive Offices, etc. * * *' approved June 16, 1933, any claim for yearly renewable term insurance under the provisions of laws repealed by said section 17, wherein claim was duly filed prior to March 20, 1933, and on which maturity of the insurance contract had been determined by the Veterans' Administration prior to March 20, 1933, and where payments could not be made because of the provisions of the Act of March 20, 1933, or under the provisions of the Act of June 16, 1933, may be adjudicated by the Veterans' Administration and any person found entitled to yearly renewable term insurance benefits claimed shall be paid such benefits in accordance with and in the amounts provided by such prior laws."

tween the decisions in the *Lynch* and *Stephens* cases were evidently based upon a misinterpretation of the meaning of the *Lynch* case. Furthermore, the practice is of comparatively short duration and hence, it is submitted, should not be seriously considered in any event. Compare *Merritt* v. *Cameron*, 137 U. S. 542, 552.

III

ANY PRIVILEGE WHICH MAY HAVE EXISTED TO SUE THE UNITED STATES FOR "AUTOMATIC INSURANCE" BENEFITS SOUGHT BY THE RESPONDENT HAS IN EFFECT BEEN REVOKED BY THE REPEAL OF THE PROVISIONS FOR SUCH BENEFITS IN SECTION 17 OF THE ECONOMY ACT

Section 401 of the War Risk Insurance Act, as amended October 6, 1917 (*infra*, pp. 61–64), in granting "automatic insurance" benefits, provided that under the conditions specified therein a person in service should "be deemed to have applied for and to have been granted insurance." As previously stated, this is nothing more than a fiction of a contract, and if the privilege of suing the United States for "automatic insurance" benefits ever existed under the statutory provisions[11] giving such a privilege upon a claim under a "contract of insurance," as was held or assumed by the decisions cited by the court below (R. 63) and in respond-

[11] Section 19, World War Veterans' Act, 1924, as amended (38 U. S. C. 445) and its predecessor, Section 405, War Risk Insurance Act, October 6, 1917, *infra*, p. 64.

ent's brief in opposition (p. 5), it was based upon that fiction. It is submitted that the repeal of the provisions for the benefits in question by Section 17 of the Economy Act destroyed the fiction, which was the basis of the privilege, and hence the privilege ceased to exist.[12]

While we believe that the Tucker Act (U. S. C., Title 28, Section 41 (20) would be inapplicable, it is manifest that jurisdiction was not asserted under that Act since the case was tried before a jury. Therefore it is deemed unnecessary to consider whether the suit might have been instituted under that Act.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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DECEMBER 1937.

[12] Although this point was not specifically made in the petition for a writ of certiorari or specifically made in the court below, it is implicit in the Government's contention that the "automatic insurance" provisions have been repealed. Moreover, the point is jurisdictional and therefore may be asserted at any time.

APPENDIX

The Act of October 6, 1917, c. 105, 40 Stat. 398–410 (amending the War Risk Insurance Act), provides in part as follows:

ARTICLE I

SECTION 1. That there is established in the Treasury Department a Bureau to be known as the Bureau of War Risk Insurance, the director of which shall receive a salary at the rate of $5,000 per annum.

That there be in such bureau a Division of Marine and Seamen's Insurance and a Division of Military and Naval Insurance in charge of a commissioner of Marine and Seamen's Insurance and a commissioner of Military and Naval Insurance, respectively, each of whom shall receive a salary of $4,000 per annum.

SEC. 2. That such Act of September second, nineteen hundred and fourteen, as amended, is hereby amended by adding new sections, as follows:

SEC. 12. That sections two to seven, inclusive, and section nine, shall be construed to refer only to the Division of Marine and Seamen's Insurance.

SEC. 13. That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary

or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in sections five and four hundred and five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions, to regulate the matter of the compensation, if any, but in no case to exceed ten per centum, to be paid to claim agents and attorneys for services in connection with any of the matters provided for in articles two, three, and four, and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the method of making investigations and medical examinations, and the manner and form of adjudications and awards.

SEC. 14. That the bureau and its divisions shall have such deputies, assistants, actuaries, clerks, and other employees as may be from time to time provided by Congress. The bureau shall, by arrangement with the Secretary of War and the Secretary of the Navy, respectively, make use of the services of surgeons in the Army and Navy. The Secretary of the Treasury is authorized to establish an advisory board consisting of three members skilled in the practice of insurance against death or disability for the

purpose of assisting the Division of Military and Naval Insurance in fixing premium rates and in the adjustment of claims for losses under the contracts of insurance provided for in article four and in adjusting claims for compensation under article three; compensation for the persons so appointed to be determined by the Secretary of the Treasury, but not to exceed $20 a day each while actually employed.

SEC. 15. That for the purposes of this Act, the director, commissioners, and deputy commissioners shall have power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles, to require the production of books, papers, documents, and other evidence, to administer oaths and to examine witnesses upon any matter within the jurisdiction of the bureau. The director may obtain such information and such reports from officials and employees of the departments of the Government of the United States and of the States as may be agreed upon by the heads of the respective departments. In case of disobedience to a subpoena, the bureau may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court, within the jurisdiction of which the inquiry is carried on, may, in case of contumacy or refusal to obey a subpoena issued to any officer, agent, or employee of any corporation or other person, issue an order requiring such corporation or other person to appear before the bureau, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a con-

tempt thereof. Any person so required to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States.

SEC. 16. That the director shall submit annually to the Secretary of the Treasury estimates of the appropriations necessary for the work of the bureau.

SEC. 17. That for the purpose of carrying out the provisions of this Act there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of $100,000 for the payment of all expenses incident to the work authorized under this Act, including salaries of the director and commissioners and of such deputies, assistants, accountants, experts, clerks, and other employees in the District of Columbia or elsewhere, as the Secretary of the Treasury may deem necessary, traveling expenses, rent and equipment of offices, typewriters and exchange of same, purchase of law books and books of reference, printing and binding to be done at the Government Printing Office, and all other necessary expenses. With the exception of the director, the commissioners, and such special experts as the Secretary of the Treasury may from time to time find necessary for the conduct of the work of the bureau, all employees of the bureau shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law. Such fees, allowances, and salaries shall be the same as are paid for similar services in other departments of the Government.

SEC. 18. That there is hereby appropriated from any money in the Treasury not otherwise appropriated, the sum of $141,-

000,000, to be known as the military and naval family allowance appropriation, for the payment of the family allowances provided by Article II. Payments out of this appropriation shall be made upon and in accordance with awards by the Commissioner of the Division of Military and Naval Insurance.

SEC. 19. That there is hereby appropriated, from any money in the Treasury not otherwise appropriated, the sum of $12,150,000, to be known as the military and naval compensation appropriation, for the payment of the compensation, funeral expenses, services, and supplies provided by Article III. Payments out of this appropriation shall be made upon and in accordance with awards by the director.

SEC. 20. That there is hereby appropriated, from any money in the Treasury not otherwise appropriated, the sum of $23,000,000, to be known as the military and naval insurance appropriation. All premiums that may be collected for the insurance provided by the provisions of Article IV shall be deposited and covered into the Treasury to the credit of this appropriation.

Such sum, including all premium payments, is hereby made available for the payment of the liabilities of the United States incurred under contracts of insurance made under the provisions of Article IV. Payments from this appropriation shall be made upon and in accordance with awards by the director.

SEC. 21. That there shall be set aside as a separate fund in the Treasury, to be known as the military and naval pay deposit fund, all sums held out of pay as provided by section two hundred and three of this Act. Such fund, including all additions, is hereby

made available for the payment of the sums so held and deposited, with interest, as provided in section two hundred and three, and the amount necessary to pay interest is hereby appropriated.

SEC. 22. That for the purpose of this amendatory Act the marriage of the claimant to the person on account of whom the claim is made shall be shown—

(1) By a duly verified copy of a public or church record; or

(2) By the affidavit of the clergyman or magistrate who officiated; or

(3) By the testimony of two or more eyewitnesses to the ceremony; or

(4) By a duly verified copy of the church record of baptism of the children; or

(5) By the testimony of two or more witnesses who know that the parties lived together as husband and wife, and were recognized as such, and who shall state how long, within their knowledge, such relation continued: *Provided,* That marriages, except such as are mentioned in section forty-seven hundred and five of the Revised Statutes, shall be proven in compensation or insurance cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to compensation or insurance accrued; and the open and notorious illicit cohabitation of a widow who is a claimant shall operate to terminate her right to compensation or insurance from the commencement of such cohabitation: *Provided further,* That for the purpose of the administration of Article II of this Act marriage shall be conclusively presumed, in the absence of proof, that there is a legal spouse living, if the man and woman have lived together in the openly acknowledged relation

of husband and wife during the two years immediately preceding the date of the declaration of war, or the date of enlistment or of entrance into or employment in active service in the military or naval forces of the United States if subsequent to such declaration.

In Articles II, III, and IV of this Act unless the context otherwise requires—

(1) The term "child" includes—

(a) A legitimate child.

(b) A child legally adopted more than six months before the enactment of this amendatory Act or before enlistment or entrance into or employment in active service in the military or naval forces of the United States, whichever of these dates is the later.

(c) A stepchild, if a member of the man's household.

(d) An illegitimate child, but, as to the father, only, if acknowledged by instrument in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child's support, and if such child, if born after December thirty-first, nineteen hundred and seventeen, shall have been born in the United States, or in its insular possessions.

(2) The term "grandchild" means a child as above defined of a child as above defined.

(3) Except as used in section four hundred and one and in section four hundred and two the terms "child" and "grandchild", are limited to unmarried persons either (a) under eighteen years of age, or (b) of any age, if insane, idiotic, or otherwise permanently helpless.

(4) The term "parent" includes a father, mother, grandfather, grandmother, step-

father, and stepmother, either of the person in the service or of the spouse.

(5) The terms "brother" and "sister" include brothers and sisters of the half blood as well as those of the whole blood, stepbrothers and stepsisters, and brothers and sisters through adoption.

(6) The term "commissioned officer" includes a warrant officer, but includes only an officer in active service in the military or naval forces of the United States.

(7) The terms "man" and "enlisted man" mean a person, whether male or female, and whether enlisted, enrolled, or drafted into active service in the military or naval forces of the United States, and include noncommissioned and petty officers, and members of training camps authorized by law.

(8) The term "enlistment" includes voluntary enlistment, draft, and enrollment in active service in the military or naval forces of the United States.

(9) The term "commissioner" means the Commissioner of Military and Naval Insurance.

(10) The term "injury" includes disease.

(11) The term "pay" means the pay for service in the United States according to grade and length of service, excluding all allowances.

(12) The term "military or naval forces" means the Army, the Navy, the Marine Corps, the Coast Guard, the Naval Reserves, the National Naval Volunteers, and any other branch of the United States service while serving pursuant to law with the Army or the Navy.

SEC. 23. That when, by the terms of this amendatory Act, any payment is to be made to a minor, other than a person in the mili-

tary or naval forces of the United States, or to a person mentally incompetent, such payment shall be made to the person who is constituted guardian or curator by the laws of the State or residence of claimant, or is otherwise legally vested with responsibility or care of the claimant.

SEC. 24. That the Bureau of War Risk Insurance, so far as practicable, shall upon request furnish information to and act for persons in the military or naval service, with respect to any contracts of insurance whether with the Government or otherwise, as may be prescribed by regulations. Said bureau may upon request procure from and keep a record of the amount and kind of insurance held by every commissioned and appointed officer and of every enlisted man in the military or naval service of the United States, including the name and principal place of business of the company, society, or organization in which such insurance is held, the date of the policy, amount of premium, name and relationship of the beneficiary and such other data as may be deemed of service in protecting the interests of the insured and beneficiaries.

SEC. 25. That whoever in any claim for family allowance, compensation, or insurance, or in any document required by this Act or by regulation made under this Act, makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

SEC. 26. That if any person entitled to payment of family allowance or compensation under this Act, whose right to such payment under this Act ceases upon the hap-

pening of any contingency, thereafter fraudulently accepts any such payment, he shall be punished by a fine of not more than $2,000, or by imprisonment for not more than one year, or both.

ARTICLE II. ALLOTMENTS AND FAMILY ALLOWANCES

SEC. 200. That the provisions of this article shall apply to all enlisted men in the military or naval forces of the United States.

SEC. 201. That allotment of pay shall, subject to the conditions, limitations, and exceptions hereinafter specified, be compulsory as to wife, a former wife divorced who has not remarried and to whom alimony has been decreed, and a child, and voluntary as to any other person; but on the written consent of the wife or former wife divorced, supported by evidence satisfactory to the bureau of her ability to support herself and the children in her custody, the allotment for her and for such children may be waived; and on the enlisted man's application or otherwise for good cause shown, exemption from the allotment may be granted upon such conditions as may be prescribed by regulations.

The monthly compulsory allotment shall be in an amount equal to the family allowance hereinafter specified except that it shall not be more than one-half the pay, or less than $15; but for a wife living separate and apart under court order or written agreement or for a former wife divorced, it shall not exceed the amount specified in the court order, decree, or written agreement to be paid to her. For an illegitimate child, to whose support the father has been judicially ordered or decreed to contribute, it shall not

exceed the amount fixed in the order or decree.

If there be an allotment for a wife or child, a former wife divorced and who has not remarried shall be entitled to a compulsory allotment only out of the difference, if any, between the allotment for the wife or child or both and one-half of the pay.

SEC. 202. That the enlisted man may allot any proportion or proportions or any fixed amount or amounts of his monthly pay or of the proportion thereof remaining after the compulsory allotment, for such purposes and for the benefit of such person or persons as he may direct, subject, however, to such conditions and limitations as may be prescribed under regulations to be made by the Secretary of War and the Secretary of the Navy, respectively.

SEC. 203. That in case one-half of an enlisted man's monthly pay is not allotted, regulations to be made by the Secretary of War and the Secretary of the Navy, respectively, may require, under such circumstances and conditions as may be prescribed in such regulations, that any proportion of such one-half pay as is not allotted shall be deposited to his credit, to be held during such period of his service as may be prescribed. Such deposits shall bear interest at the rate of four per centum per annum, with semiannual rests and, when payable, shall be paid principal and interest to the enlisted man, if living, otherwise to any beneficiary or beneficiaries he may have designated, or if there be no such beneficiary, then to the person or persons who would under the laws of the State of his residence be entitled to his personal property in case of intestacy.

SEC. 204. That a family allowance of not exceeding $50 per month shall be granted and paid by the United States upon written application to the bureau by such enlisted man or by or on behalf of any prospective beneficiary, in accordance with and subject to the conditions, limitations, and exceptions hereinafter specified.

The family allowance shall be paid from the time of enlistment to death in or one month after discharge from the service, but not for more than one month after the termination of the present war emergency. No family allowance shall be made for any period preceding November first, nineteen hundred and seventeen. The payment shall be subject to such regulations as may be prescribed relative to cases of desertion and imprisonment and of missing men.

Subject to the conditions, limitations, and exceptions hereinabove and hereinafter specified, the family allowance payable per month shall be as follows:

Class A. In the case of a man, to his wife (including a former wife divorced) and to his child or children:

(a) If there be a wife but no child, $15.

(b) If there be a wife and one child, $25.

(c) If there be a wife and two children, $32.50, with $5 per month additional for each additional child.

(d) If there be no wife, but one child, $5.

(e) If there be no wife, but two children, $12.50.

(f) If there be no wife, but three children, $20.

(g) If there be no wife, but four children, $30, with $5 per month additional for each additional child.

Class B. In the case of a man or woman, to a grandchild, a parent, brother, or sister:

(a) If there be one parent, $10.

(b) If there be two parents, $20.

(c) For each grandchild, brother, sister, and additional parent, $5.

In the case of a woman, to a child or children:

(d) If there be one child, $5.

(e) If there be two children, $12.50.

(f) If there be three children, $20.

(g) If there be four children, $30, with $5 per month additional for each additional child.

SEC. 205. That family allowances for members of Class A shall be paid only if and while a compulsory allotment is made to a member or members of such class. The monthly family allowance to a former wife divorced shall be payable only out of the difference, if any, between the monthly family allowance to the other members of Class A and the sum of $50, and only then if alimony shall have been decreed to her. For a wife living separate and apart under court order or written agreement or to a former wife divorced the monthly allowance, together with the allotment, if any, shall not exceed the amount specified in the court order, decree, or written agreement to be paid to her. For an illegitimate child, to whose support the father has been judicially ordered or decreed to contribute, it shall not exceed the amount fixed in the order or decree.

SEC. 206. That family allowances to members of Class B shall be granted only if and while the member is dependent in whole or in part on the enlisted man, and then only if and while the enlisted man makes a monthly allotment of his pay for such member or members equal to the amount of the

monthly family allowance as hereinabove specified, except that—

(a) The maximum monthly allotment so required to be made to members of Class B shall be one-half of his pay.

(b) If he is making no allotment to a member of Class A, the minimum monthly allotment so designated to be made to members of Class B shall be $15 per month.

(c) If he is making the compulsory allotment to a member of Class A, the minimum monthly allotment so designated to be made to members of Class B shall be one-seventh of his pay, but not less than $5 per month.

On the enlisted man's application, or otherwise for good cause shown, exemption from this additional allotment under Class B as a condition to the allowance may be granted, upon such conditions as may be prescribed by regulations.

SEC. 207. That the amount of the family allowance to members of Class B shall be subject to each of the following limitations:

(a) If an allowance is paid to one or more beneficiaries of Class A, the total allowance to be paid to the beneficiaries of Class B shall not exceed the difference between the allowance paid to the beneficiaries of Class A and the sum of $50.

(b) The total monthly allowance to beneficiaries of Class B added to the enlisted man's monthly allotment to them shall not exceed the average sum habitually contributed by him to their support monthly during the period of dependency but not exceeding a year immediately preceding his enlistment or the enactment of this amendatory Act.

SEC. 208. That as between the members of Class A and as between the members of

Class B, the amount of the allotment and family allowance shall be apportioned as may be prescribed by regulations.

SEC. 209. The War and Navy Departments, respectively, shall pay over to the Treasury Department monthly the entire amount of such allotments for distribution to the beneficiaries, and the allotments and family allowances shall be paid by the bureau to or for the beneficiaries.

SEC. 210. That upon receipt of any application for family allowance the commissioner shall make all proper investigations and shall make an award, on the basis of which award the amount of the allotments to be made by the man shall be certified to the War Department or Navy Department, as may be proper. Whenever the commissioner shall have reason to believe that an allowance has been improperly made or that the conditions have changed, he shall investigate or reinvestigate and may modify the award. The amount of each monthly allotment and allowance shall be determined according to the conditions then existing.

ARTICLE III. COMPENSATION FOR DEATH OR DISABILITY

SEC. 300. That for death or disability resulting from personal injury suffered or disease contracted in the line of duty, by any commissioned officer or enlisted man or by any member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) when employed in the active service under the War Department or Navy Department, the United States shall pay compensation as hereinafter provided; but no compensation shall be paid if the injury or disease has been caused by his own willful misconduct.

SEC. 301. That if death results from injury—

If the deceased leaves a widow or child, or if he leaves a widowed mother dependent upon him for support, the monthly compensation shall be the following amounts:

(a) For a widow alone, $25.

(b) For a widow and one child, $35.

(c) For a widow and two children, $47.50, with $5 for each additional child up to two.

(d) If there be no widow, then for one child, $20.

(e) For two children, $30.

(f) For three children, $40, with $5 for each additional child up to two.

(g) For a widowed mother, $20. The amount payable under this subdivision shall not be greater than a sum which, when added to the total amount payable to the widow and children, does not exceed $75. This compensation shall be payable for the death of but one child, and no compensation for the death of a child shall be payable if such widowed mother is in receipt of compensation under the provisions of this article for the death of her husband. Such compensation shall be payable whether her widowhood arises before or after the death of the person and whenever her condition is such that if the person were living the widowed mother would have been dependent upon him for support.

If the death occur before discharge or resignation from service, the United States shall pay for burial expenses and the return of body to his home a sum not to exceed $100, as may be fixed by regulations.

The payment of compensation to a widow or widowed mother shall continue until her death or remarriage.

The payment of compensation to or for a child shall continue until such child reaches the age of eighteen years or marries, or if such child be incapable, because of insanity, idiocy, or being otherwise permanently helpless, then during such incapacity.

Whenever the compensation payable to or for the benefit of any person under the provisions of this section is terminated by the happening of the contingency upon which it is limited, the compensation thereafter for the remaining beneficiary or beneficiaries, if any, shall be the amount which would have been payable to them if they had been the sole original beneficiaries.

As between the widow and the children not in her custody, and as between children, the amount of the compensation shall be apportioned as may be prescribed by regulations. The word "widow" as used in this section shall not include one who shall have married the deceased later than ten years after the time of injury.

SEC. 302. That if disability results from the injury—

(1) If and while the disability is total, the monthly compensation shall be the following amounts:

(a) If he has neither wife nor child living, $30.

(b) If he has a wife but no child living, $45.

(c) If he has a wife and one child living, $55.

(d) If he has a wife and two children living, $65.

(e) If he has a wife and three or more children living, $75.

(f) If he has no wife but one child living, $40, with $10 for each additional child up to two.

(g) If he has a widowed mother dependent on him for support, then, in addition to the above amounts, $10.

To an injured person who is totally disabled and in addition so helpless as to be in constant need of a nurse or attendant, such additional sum shall be paid, but not exceeding $20 per month, as the director may deem reasonable: *Provided, however,* That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month: *Provided further,* That no allowance shall be made for nurse or attendant.

(2) If and while the disability is partial, the monthly compensation shall be a percentage of the compensation that would be payable for his total disability, equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than ten per centum.

A schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature shall be adopted and applied by the bureau. Ratings may be as high as one hundred per centum. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case, so that

there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of a permanent injury. The bureau shall from time to time readjust this schedule of ratings in accordance with actual experience.

(3) In addition to the compensation above provided, the injured person shall be furnished by the United States, such reasonable governmental medical, surgical, and hospital services and with such supplies, including artificial limbs, trusses, and similar appliances, as the director may determine to be useful and reasonably necessary: *Provided,* That nothing in this Act shall be construed to affect the necessary military control over any member of the military or naval establishments before he shall have been discharged from the military or naval service.

(4) The amount of each monthly payment shall be determined according to the family conditions then existing.

SEC. 303. That every person applying for or in receipt of compensation for disability under the provisions of this article shall, as frequently and at such times and places as may be reasonably required, submit himself to examination by a medical officer of the United States or by a duly qualified physician designated or approved by the director. He may have a duly qualified physician designated and paid by him present to participate in such examination. For all examinations he shall, in the discretion of the director, be paid his reasonable traveling and other expenses and also loss of wages incurred in order to submit to such examination. If he refuses to submit himself for, or in any way obstructs, any examination, his right to claim compensation under this arti-

cle shall be suspended until such refusal or obstruction ceases. No compensation shall be payable while such refusal or obstruction continues, and no compensation shall be payable for the intervening period.

Every person in receipt of compensation for disability shall submit to any reasonable medical or surgical treatment furnished by the bureau whenever requested by the bureau; and the consequences of unreasonable refusal to submit to any such treatment shall not be deemed to result from the injury compensated for.

SEC. 304. That in cases of dismemberment, of injuries to sight or hearing, and of other injuries commonly causing permanent disability, the injured person shall follow such course or courses of rehabilitation, reeducation, and vocational training as the United States may provide or procure to be provided. Should such course prevent the injured person from following a substantially gainful occupation while taking same, a form of enlistment may be required which shall bring the injured person into the military or naval service. Such enlistment shall entitle the person to full pay as during the last month of his active service, and his family to family allowances and allotment as hereinbefore provided, in lieu of all other compensation for the time being.

In case of his willful failure properly to follow such course or so to enlist, payment of compensation shall be suspended until such willful failure ceases and no compensation shall be payable for the intervening period.

SEC. 305. That upon its own motion or upon application the bureau may at any time review an award, and, in accordance with the facts found upon such review, may

Statement.

In suit instituted in the United States District Court for the Eastern District of North Carolina, pursuant to the provisions of Section 19, World War Veterans' Act, 1924 as amended [1] for death insurance benefits by Ben B. Jackson, a minor, against the United States, in which it was claimed that he was the son of the deceased soldier, Jake Jackson (R. 1), the United States, in its answer (R. 3-4) admitted that Jake Jackson was drafted in the United States Army on April 27, 1918, and died May 11, 1918, without having applied for war risk insurance. It is provided, that under these circumstances, the insured soldier shall be deemed to have applied for and to have been granted insurance payable at his death in monthly installments of $25.00 each for a period of 240 months.[2] The jury

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[1] Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930, provides: "Sec. 19. In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. • • • Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the bureau shall have three years in which to bring suit after the removal of their disabilities."

[2] Section 401 of the War Risk Insurance Act as amended December 24, 1919, c. 16, 41 Stat. 371, 374-375, provides in part: "Any person in the active service on or after the 6th day of April 1917, and before the 11th day of November 1918, who, while in such service, and before the expiration of one hundred and twenty days after October 15, 1917, or one hundred and twenty days after entrance into or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each; and any person inducted into the service by a local draft board after the 6th day of April 1917 and before the 11th day of November 1918, who, while in such service, and before being accepted and enrolled for active military or naval service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be

found for the plaintiff (R. 5). The Circuit Court of Appeals affirmed (R. 64).

Question Presented.

This Court granted certiorari upon the single question of whether Section 401 of the Act of December 24, 1919 [2] was repealed by Section 17 of the Economy Act of March 20, 1933 [3] (R. 66).

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deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments, or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his widow from the time of his death and during her widowhood; or if there is no widow surviving him, then to his child or children; or if there is no child surviving him, then to his mother; or if there be no mother surviving him, then to his father, if and while they survive him: Provided, however, that no more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid. The amount of the monthly installments shall be apportioned between children as may be provided by regulations." * * *

[3] Sec. 17 of the Act of March 20, 1933, c. 3, 48 Stat. 8, 11; known as the Economy Act, provides in part: "All public laws granting medical or hospital treatment, domiciliary care, compensation, and other allowances, pension, disability allowance, or retirement pay to veterans and the dependents of veterans of * * * the World War * * * are hereby repealed, and all laws granting or pertaining to yearly renewable term insurance are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted. The Administrator of Veterans' Affairs under the general direction of the President shall immediately cause to be reviewed all allowed claims under the above referred to laws, and where a person is found entitled under this Act, authorize payment or allowance of benefits in accordance with the provisions of this Act commencing with the first day of the fourth calendar month following the month during which this Act is enacted, and notwithstanding the provisions of Section 9 of this Act, no further claim in such cases shall be required: *Provided,* That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending. * * *"

Summary of Argument.

I.

THE RIGHT TO "AUTOMATIC INSURANCE" BENEFITS WAS FOUNDED UPON CONTRACT.

(a). *It was clearly the intention of Congress to place automatic insurance in the same category as insurance for which application was made.*

(b). *The government departments charged with the responsibility of administering this law have held that it was obvious that Congress intended persons receiving automatic insurance benefits to be treated as if they had contracts of insurance.*

(c). *The courts have held that automatic insurance is a contract within the language of the statute permitting suits of this character to be brought in the Federal Courts.*

II.

CONGRESS DID NOT RESCIND THE RIGHT TO AUTOMATIC INSURANCE BENEFITS IF ITS ATTEMPT TO RESCIND THE RIGHT TO YEARLY RENEWABLE TERM INSURANCE WAS VOID AND BEYOND ITS POWERS, AS REPEAL BY IMPLICATION IS NOT FAVORED.

III.

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THE CASE OF STEPHENS V. UNITED STATES, 85 F. (2d) 570 WAS NOT GROUNDED UPON THE PROPOSITION THAT AUTOMATIC INSURANCE WAS REPEALED BUT THE REMARKS OF THE COURT IN THAT RESPECT WERE MERE DICTUM.

ARGUMENT.

I.

The right to "Automatic Insurance" benefits was founded upon contract.

(a). *It was clearly the intention of Congress to place automatic insurance in the same category as insurance for which application was made.*

The purpose behind the right to automatic insurance was to afford protection to all those in the active service prior to the publication of the terms of the actual contract of insurance who, of necessity, had not had the opportunity to apply for insurance, as well as to persons who became disabled or died within a limited period after such publication without having applied for insurance. That purpose is well expressed in the statements of Secretary of the Treasury McAdoo, who was largely responsible for the preparation of this bill before the House Committee of Interstate and Foreign Commerce at the hearings on H. R. 5723, which later became the War Risk Insurance Act.[4]

The statements relative to the automatic insurance provisions in the reports of the committee in submitting the bill

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[4] In the report of the hearings on H. R. 5723 appears the following colloquy (part 2, pp. 36-37):

Mr. Sims: * * * Why should not this bill be amended so as to take effect at a time so early that if the bill should not pass in that time it should be retroactive to that date, so as to cover the case of soldiers who are already in the service and who will be in the service before this bill is approved?

Secretary McAdoo: I think we cover that by a provision of the bill * * *.

Mr. Chairman: I do not see how you can make the insurance provision retroactive.

Secretary McAdoo: We have done something similar to that, because we have provided that in case of death which occurs before this bill is passed and before the man can have the opportunity, it would be presumed that he took a certain amount of insurance, and the Government will take care of that.

to the House of Representatives show that the purpose of said provisions, as expressed by Secretary McAdoo, was understood and accepted by Congress.[5]

Section 401 of the War Risk Insurance Act as amended December 24, 1919, c. 16, 41 Stat. 371, 374-375 provides in part:

> "Any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who while in such service and before * * * 120 days after entrance into or employment in the active service * * * dies or has died without having applied for insurance *shall be deemed* to have applied for and to have been granted insurance * * *."

The word "insurance" is there used in its sense of "contract of insurance," and the words, "shall be deemed" are the equivalent of "shall be conclusively presumed." The literal meaning of the whole provision, therefore, is that each person coming within its terms shall be conclusively presumed to have applied for and to have been granted a *contract of insurance.*

(b). *The government departments charged with the responsibility of administering this law have held that it was*

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[5] It was stated in the first report of said Committee (H. R. Report No. 130, 65th Cong., 1st Sess., part 1, p. 2):

Another valuable feature of the bill is that if during the first 120 days after the enlistment the soldier should fail to take insurance, and die, he will be considered as insured and the benefits of such insurance will go to his family.

The minority report on the same bill contains a similar statement (H. R. Report 130, part 2, p. 7); and the supplemental report of said House Committee (H. R. Report 130, part 3, p. 12) states:

SECTION 301. Must be applied for within 120 days after promulgation of terms or subsequent entry into service. Any person in active service on or after April 6, 1917, who is totally disabled or dies before expiration of the 120 days is deemed insured for life in monthly installments of $25, and if he dies before receiving 240 such installments, balance payable monthly to, but only if and while there survive him, widow, child or widowed mother.

obvious that Congress intended the person receiving automatic insurance benefits to be treated as if they had contracts of insurance.

In the case of *Jacob Crvik* v. *United States,* a case in which judgment had been obtained for the payment of automatic insurance benefits by a District Court in 1928, Honorable William D. Mitchell, then Solicitor General of the United States, when the question of authorizing an appeal was before him for consideration was of the opinion that it was obvious that Congress intended those persons receiving automatic insurance benefits to be in all respects like those who had applied for insurance, and was of the opinion that they should be treated as if they had insurance contracts.[6]

The Administrator of Veterans' Affairs has paid and is now paying monthly installments in over 7,000 automatic

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[6] OFFICE OF THE SOLICITOR GENERAL

17-82.30 WASHINGTON, D. C. November 1, 1937.

MEMORANDUM FOR MR. FARNUM.

In re: Jacob Crvik v. United States.

My first intention was to authorize an appeal on the jurisdictional question, but on going further into the file and giving further thought to the case I am satisfied no appeal should be taken. Whether jurisdiction exists depends on the intention of Congress. It is perfectly obvious that Congress intended those getting "automatic" insurance to be in all respects like those who applied. They are to be treated as if they had contracts. There can be no possible reason why Congress could have intended to deny such persons relief in the courts.

If by any possibility we should succeed in the litigation, we could only expect remedial legislation to overturn the result and nothing would be gained.

The test I apply in a case like this is whether we could support in the Supreme Court a decision of the Circuit Court of Appeals in our favor. I am satisfied we could not. I think the case is hopeless and we will only be unduly harassing claimants and wasting time and money to go on with it.

The United States Attorneys should be instructed in all these cases not to claim want of jurisdiction.

WILLIAM D. MITCHELL,
Solicitor General.

insurance cases in which the right vested and accrued, as did the right of this minor plaintiff, some nineteen years ago.[7] The position of government counsel here is not only inconsistent with the practice established by the Department of Justice almost ten years ago, but is also at variance with the conduct of the Administrator of Veterans' Affairs in continuing the payment of such claims.

In *United States* v. *The Alabama Great Southern Railroad Company*, 142 U. S. 615, the controversy involved the proper construction of a statute relating to concession in the price for transporting mails where the carrier had received land grants from the Government. The Post Office Department had construed the statute in a certain manner, which construction was followed from 1876 to 1885 by three Postmasters General. Then a new Postmaster General sought to change the construction and this Court denied his right so to do and held in favor of the carrier. In the course of the opinion (page 621) this Court said:

> "We think the contemporaneous construction thus given by the executive department of the Government, and continued for nine years through six different administrations of that Department; a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case, should be considered as decisive in this suit. It is a settled doctrine of this Court that in case of ambiguity, the judicial department will lean in favor of a construction given to

[7] The Annual Report of the Administrator of Veterans' Affairs for the year 1936 stated (at page 28) "Payments of automatic insurance (provided for those who were permanently and totally disabled or who died within 120 days after entrance into service and before making application for term insurance) are being made to 305 permanently and totally disabled veterans, of whom 201, or 65.90 per cent are suffering from neuropsychiatric diseases; 60 or 19.67 per cent from tuberculosis; and 44, or 14.43 per cent, from general medical and surgical conditions. In the cases of 6,861 deceased veterans, this insurance is being paid to their beneficiaries, classified as follows: 5,775 parents, 580 widows and 506 children."

a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

Had the Administrative Officer who was charged with the responsibility of administering this law felt that this law repealed the right to pay these claims after the date of its enactment, to wit, March 20, 1933, he certainly would have ceased payments in such cases. By not discontinuing these payments, he has treated these automatic insurance claims the same as claims under contracts of yearly renewable term insurance which matured prior to date of enactment of the Economy Act.

From letter of the Administrator of Veterans' Affairs appearing on pages 80 to 85 inclusive of government counsel's brief (Appendix) it is evident that this public officer charged with the duty of administering the laws pertaining to insurance;

1. Has been paying benefits of automatic insurance on new claims filed after the enactment of the Economy Act.

2. Has issued a regulation giving benefits of "automatic insurance" the same status as benefits of those having contracts of war risk term insurance, and has promulgated the same rules with regard to the payment of benefits of the so-called "automatic insurance" as he did with respect to the war risk term insurance contracts.

3. He considered later amendatory legislation[8] to the so-called "Economy Act" as applicable to so-called "automatic

[8] Public No. 78, 73rd Congress provides: "Notwithstanding the provisions of Section 17, Title I, Public Numbered 2, Seventy-third Congress, any claim for yearly renewable term insurance on which premiums were paid to the date of death of the insured and any claim for pension, compensation allowance, or emergency officers' retirement pay under the

insurance'' as well as war risk term contracts of insurance, even though such legislation did not specifically mention automatic insurance.

4. He added ''including automatic insurance'' to his regulations respecting term insurance.[9]

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provisions of laws repealed by said Section 17 wherein claim was duly filed prior to March 20, 1933, may be adjudicated by the Veterans' Administration on the proofs and evidence received by the Veterans' Administration prior to March 20, 1933 and any person found entitled to the benefits claimed shall be paid such benefits in accordance with and in the amounts provided by such prior laws."

Public No. 141, 73rd Congress provides: "Sec. 35. That notwithstanding the provisions of Section 17 of Title I of an Act entitled "An Act to maintain the credit of the United States Government," approved March 20, 1933, and Section 20 of an Act entitled "An Act making appropriations for the Executive Office and sundry independent executive bureaus, boards, commissions, and offices, for the fiscal year ending June 30, 1934, and for other purposes," approved June 16, 1933, any claim for yearly renewable term insurance under the provisions of laws repealed by said Section 17, wherein claim was duly filed prior to March 20, 1933, and on which maturity of the insurance contract had been determined by the Veterans' Administration prior to March 20, 1933, and where payments could not be made because of the provisions of the Act of March 20, 1933, or under the provisions of the Act of June 16, 1933, may be adjudicated by the Veterans' Administration, and any person found entitled to yearly renewable term insurance benefits claimed shall be paid such benefits in accordance with and in the amounts provided by such prior laws."

[9] Veterans' Regulation No. 8, promulgated March 31, 1933, pursuant to the Economy Act, provides in part:

III. Payments under contracts of yearly renewable term insurance (including automatic insurance) which have matured, and under which payments have been commenced prior to March 20, 1933, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance (including automatic insurance), or which may hereafter be rendered in any such suit pending in court on March 20, 1933, may hereafter be made.

IV. Further payment of benefits on account of the death of an insured to whom yearly renewable term insurance (including automatic insurance) benefits have been awarded and are being paid in accordance with paragraph III of this regulation shall be made in accordance with the World War Veterans' Act 1924 as amended, and precedents in effect thereunder.

V. Except as stated above, no payments may hereafter be made under contracts of yearly renewable term insurance (including automatic in-

5. He approved opinions of his Solicitor which recognized that:

(a) "Automatic insurance" came within the phrase "yearly renewable term insurance" insofar as the repealing provisions of Section 17 of Public No. 2 is concerned; and

(b) Automatic insurance is a contract of yearly renewable term insurance within the meaning of the so-called "saving clause" of Section 17 of the Economy Act; and

(c) Automatic insurance shall be considered as a contrast of insurance within the meaning of Section 19 of the World War Veterans' Act, 1924, as amended[10] and

(d) Automatic insurance is embraced by Section 20 of Public No. 78 concerning:

> "any claim for yearly renewable term insurance on which premiums were paid to the date of death of the insured."

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surance) and all pending claims or claims hereafter filed for such benefits shall be disallowed.

Veterans' Regulation 8a promulgated June 30, 1934, cancelled Veterans' Regulation 8.

EXECUTIVE ORDER

VETERANS' REGULATION NO. 8a

Executive Order No. 6096 dated March 31, 1933 (Veterans' Regulation No. 8), is hereby cancelled as of the date thereof.

FRANKLIN D. ROOSEVELT.

The White House, June 30, 1934.

No. 6776.

[10] Section 19 of the World War Veterans Act 1924, as amended, July 3, 1931 (Public 522, 71st Congress, Sec. 445, Title 38 U. S. C. A. (Supp.) provides:

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Bureau and any person or persons claiming thereunder, an action on the claim may be brought against the United States, either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the District in which such persons or any one of them, resides."

(e) Automatic insurance is embraced by the language of Section 35, Public 141, 73rd Congress[11] pertaining to "any claim for yearly renewable term insurance."

(f) Veterans' Regulation No. 8 [12] bracketed automatic insurance with yearly renewable term insurance with respect to the rights of claimants to benefits.

This contemporaneous construction of this Act given by the Executive Department of the Government charged with the responsibility of its administration, continued since March 20, 1933 (the effective date of the Economy Act), certainly consorts with the equities involved, is entitled to great respect and should be given weight. *United States* v. *The Alabama Great Southern Railroad Co.*, 142 U. S. 615; *National Lead Co.* v. *United States*, 252 U. S. 140.

(c) *The Courts have held that automatic insurance is a contract within the language of the statute permitting suits of this character to be brought in the Federal Courts.*

The only authorization by Congress of suits on claims for insurance benefits such as is the subject of this litigation, is

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[11] Public No. 141, 73rd Congress, provides:

"Sec. 35. That notwithstanding the provisions of Section 17 of title I of an Act entitled "An Act to maintain the credit of the United States Government," approved March 20, 1933, and Section 20 of an Act entitled "An Act making appropriations for the Executive Office and sundry independent executive bureaus, boards, commissions and offices, for the fiscal year ending June 30, 1934 and for other purposes," approved June 16, 1933, any claim for yearly renewable term insurance under the provisions of laws repealed by said Section 17, wherein claim was duly filed prior to March 20, 1933, and on which maturity of the insurance contract had been determined by the Veterans' Administration prior to March 20, 1933, and where payments could not be made because of the provisions of the Act of March 20, 1933, or under the provisions of the Act of June 16, 1933, may be adjudicated by the Veterans' Administration, and any person found entitled to yearly renewable term insurance benefits claimed shall be paid such benefits in accordance with and in the amounts provided by such prior laws * * *."

[12] See footnote 9.

found in Section 19 of the World War Veterans' Act 1924, as amended, and refers to a disagreement as to a claim under a contract of insurance.[13]

In the case of *United States* v. *Carlson* (C. C. A. 9) 44 F. (2d) 5 the Court said:

> "Now what were Appellee's rights under the repealed statute? The answer is not difficult. He is deemed to have applied for and to have been granted a contract or policy of insurance as provided in that statute. In other words, he is to be regarded and dealt with as though he were an actual policy holder under that act. It necessarily follows, therefore, that his rights are precisely the same as those possessed by a soldier who, after the enactment of the War Risk Insurance Act, applied for and received a policy of insurance."
>
> "The obvious purpose of this section was to award insurance retroactively and automatically to all persons totally and permanently disabled during the time specified while in the active service of the government during the World War, but prior to the enactment of the War Risk Insurance Act. If appellee was a member of that class of soldiers, he is entitled to the benefits conferred by the act, precisely as he would have been had he been a holder of a policy of war risk insurance subsequent to the passage of the War Risk Insurance Act. After the passage of that act the soldier was required to apply for insurance in order to entitle himself to its benefits, but by the terms of the section quoted, a soldier in the active service of the government on or after April 6, 1917, if totally and permanently disabled, is deemed to have been granted insurance; that is to say, is to be treated and dealt with precisely as though he in fact held a policy of war risk insurance made available by the act. With this single difference it would seem that both classes of soldiers stand on an equal footing in respect of insurance."

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[13] See footnote 10.

In the case of *Cunningham* v. *United States,* 67 F. (2d) 714 (C. C. A. 5) the Court held:

> "The first (contention) is untenable on its face. It is true that the grant is a gratuity in the sense that no premium is exacted of the soldier whose case it fits; but this is the only sense in which it is true. What is granted is a contract of insurance, having in all other respects than the requirement of premiums the same incidents, entitling the holder to the same rights and remedies, and governed by the same rules as contracts of insurance issued on applications and with the payment of premiums. The place where the language is found, the fact that it is an integral part of the act granting war risk insurance, the language itself, "any person * * * shall be deemed to have applied for and to have been granted insurance" under the plainest principles of statutory construction compels this conclusion. Any other would do the greatest violence to the act. Indeed, the matter is so plain that the suability of these contracts have been assumed without question. United States *v.* Carlson, 44 F. (2d) 5; Caprio *v.* United States, 45 F. (2d) 520, 521."

In the case of *U. S.* v. *Howard Preece* (C. C. A. 10) 85 F. (2d) 952, that court, in construing the provisions of Section 401 of the War Risk Insurance Act, as amended, after quoting the provisions of said section, said:

> "* * * The act plainly made an automatic award of insurance, and a person who became totally and permanently disabled while in the active military service between April 6th and the date on which the statute became effective is clearly within its terms. Plaintiff invokes its provisions and we shall assume, without deciding, that it has not been repealed, but is still in effect."

The view that claims for automatic insurance are actionable is supported by the weight of judicial precedent and

decision. In several of the reported cases involving automatic insurance it appears to have been assumed, without question, by the attorneys for the Government and the courts, that claims for such insurance were actionable. *Anderson* v. *United States* (C. C. A. 9), 36 F. (2d) 45; *United States* v. *Carlson* (C. C. A. 9) 44 F. (2d) 5; *Caprio* v. *United States* (C. C. A. 1), 45 F. (2d) 520; *Kerr* v. *United States* (C. C. A. 9) 61 F. (2d) 800.

By the Act of May 20, 1918, Section 405 of the War Risk Insurance Act was repealed and Section 13 thereof was amended to include the provisions relative to suits formerly in Section 405. (40 Stat. 555, 556.) Section 13, as so amended, provides:

> "Sec. 13. * * * that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides, * * *."

This act was amended on different occasions, the last amendment being dated July 3, 1930 (45 Stat. 1015, 38 U. S. C. A., Section 445) reads as follows:

> "Section 19. In the event of disagreement as to claim including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia, or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *
>
> * * * Infants, insane persons, or persons under other legal disability, or persons rated as incompetent, or insane by the bureau shall have three years in which to bring suit after the removal of their disabilities. * * *"

In order for suit to be possible for automatic insurance benefits it must be brought under the above quoted provision of law as there is no other provision of law for suing the government on these insurance contracts. From the enactment of the law creating automatic insurance in 1918 until 1936 (18 years) there was no intimation contrary to the accepted belief that this insurance was a contract of insurance. Now, because of certain dictum appearing in the decisions of the Court in the case of *Stephens* v. *United States*, 85 F. (2d) 520, we find the Administrator of Veterans' Affairs suspending the awarding of new claims for automatic insurance benefits, but continuing the payment of claims already filed.

In the case of *Hahn* v. *United States*, 107 U. S. 402, the appellant sought to recover a share in certain fines and forfeitures accruing at the Port of New York, and his right thereto turned primarily upon the proper construction of a statute enacted in 1867. Under the construction thereof which had been adopted and followed by the Treasury Department, he was not entitled to participate in such fines, etc. This Court approved the reasoning and conclusions of the Court of Claims which emphasized the fact that Congress had not interfered with such constructions by the Secretary of the Treasury while the Act was in force.

This was in accord with the case of *United States* v. *Pugh*, 99 U. S. 265, wherein this Court in the course of opinion observed:

> "In the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect, is entitled to great respect."

In *United States* v. *The Alabama Great Southern Railroad Company*, 142 U. S. 615, the controversy involved the proper construction of a statute relating to concession in the price of transporting mails where the carrier had received land

grants from the Government. The Post Office Department had construed the statute in a certain manner, which construction was followed from 1876 to 1885 by three Postmasters General. Then a new Postmaster General sought to change the construction and this Court denied his right so to do and held in favor of the carrier. In the course of the opinion (page 621) this Court said:

> "We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that Department; a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case, should be considered as decisive in this suit. It is a settled doctrine of this Court that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be ACTED UPON FOR A NUMBER OF YEARS, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. * * *"

That portion of the law giving the right to sue for insurance benefits has been amended time and again with the opinions of Circuit Courts of Appeals being unanimously to the effect that it gave the right to sue for automatic insurance as well as war risk term insurance contracts.

In *New York, New Haven and Hartford Railroad Company*, v. *Interstate Commerce Commission*, 200 U. S. 361 (at 401), this Court clearly indicated that notwithstanding the fact that it might disagree with the construction of the statute in certain particulars, nevertheless, since the ruling had been made by such Commission during "the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the 'Act to Regulate Commerce' is now binding, and, as re-

stricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; * * * We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, AND HAS BEEN IMPLIEDLY SANCTIONED BY THE RE-ENACTMENT OF THE STATUTE WITHOUT ALTERATION IN THE PARTICULARS CONSTRUED, when not plainly erroneous, must be treated as read into the statute'' (page 402).

Since it was—

1. The intention of Congress to place automatic insurance in the same category as insurance for which application was made, and
2. It was the administrative practice of the government officials charged with the responsibility of administering this law to consider automatic insurance benefits exactly as term insurance benefits, and
3. The courts have considered such actions as being authorized by the same law that permits suits against the United States on contracts of insurance,

it therefore follows that this minor's right to insurance benefits was founded upon contract.

Therefore, under the decision of this Court in the cases of *Lynch and Wilner* v. *United States,* 292 U. S. 571, 78 L. Ed. 1434, the right to this insurance is protected by the due process clause of the Fifth Amendment, and was not repealed by Congress.

II.

Congress did not rescind the right to automatic insurance benefits if its attempt to rescind the right to yearly renewable term insurance was void and beyond its power, as repeal by implication is not favored.

The repealing clause of Public No. 2, 73rd Congress upon which the United States relies as far as is pertinent is as follows:

> "Sec. 17. All public laws granting medical or hospital treatment, domiciliary care, compensation and other allowances, pensions, disability allowance or retirement pay to veterans * * * are hereby repealed and all laws granting or pertaining to yearly renewable term insurance are hereby repealed."

If the right to automatic insurance was repealed, then there must be a repeal by implication because there is no language of the repealing clause which refers specifically to automatic insurance. Repeals by implication are not favored by the Courts. The rule is that there can only be a repeal by implication when a new act is a substitute in its entirety for the old law.

U. S. v. *Noce*, 268 U. S. 613, 69 L. Ed. 1116;
U. S. v. *Greathouse*, 166 U. S. 601, 41 L. Ed. 1130;
U. S. v. *Yuginovich*, 256 U. S. 450, 65 L. Ed. 1043.

Public No. 2, 73rd Congress was not a substitute for the World War Veterans' Act in its entirety. It in no manner disturbs the rights of persons who had previously been awarded automatic insurance. It did not repeal the statute authorizing the issuance of government life insurance, nor did it repeal the provisions of the World War Veterans' Act relative to penalties. It did not take away the right under Section 19 of the World War Veterans' Act to bring

suits on converted government insurance. It in no way repealed the rights and liabilities existing under awards made under yearly renewable term insurance granted by the Government. It was not a substitute for but in effect an amendment of the World War Veterans' Act. Its repealing clause only repealed those provisions of the World War Veterans' Act which were specifically mentioned.

It has been held by the Fifth Circuit Court of Appeals that the repealing clause of Section 17, *supra* did not repeal Section 500 of the World War Veterans' Act fixing and limiting fees for the prosecution of claims before the Veterans' Administration.

In the case of *Lucas* v. *United States,* 80 F. (2d) 372, one Lucas was indicted and convicted of receiving and retaining a fee as an attorney in a war risk insurance suit greater than that permitted by Section 500 of the World War Veterans' Act. It was the contention of Lucas that the penal provisions of Section 500 of the World War Veterans' Act on which the indictment rested were repealed by Section 17 of the Act of March 20, 1933, *supra.* Lucas contended that it was a repeal by implication. The Court said:

> "* * * The clause repealing all laws granting or pertaining to yearly renewable term insurance was held unconstitutional as to existing contracts in *Lynch* v. *United States,* 292 U. S. 571, 54 S. Ct. 840, 78 L. ed. 1434. The contention is that the clause nevertheless is operative to repeal the penal provision of Section 500 as a law pertaining to such insurance, there being no constitutional hindrance to the mere repeal of a penal statute, and that the quoted proviso did not as to existing judgments or as to pending suits retain the penal provision but only preserved intact the payments to be made. The contention cannot prevail. The repeal of the criminal provision, if intended at all, was not by a separate clause independent of other repeals, but only as a part of the plan to repeal all laws pertaining to yearly renewable

term insurance. If that plan fails by reason of unconstitutionality, its failure is total; for there can be no certainty, and there is no probability that Congress would have repealed some of the laws on the subject independently of the repeal of others. The repealing clause under discussion must be held indivisible and to fail in its entirety. See *Lynch* v. *United States, supra; Allen* v. *Louisiana*, 103 U. S. (13 Otto) 80, 26 L. ed. 318; *Field* v. *Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 L. ed. 294; *United States* v. *Ju Toy*, 198 U. S. 253, 25 S. Ct. 644, 49 L. ed. 1040; *Commissioner of Internal Revenue* v. *Wilson* (C. C. A.) 76 F. (2d) 766. * * *" (This Court denied certiorari in the Lucas case 297 U. S. 709, 80 L. ed. 996).

The same question arose in the case of *Smith* v. *United States*, 83 F. (2d) 632 (8th C. C. A.). Smith was convicted of charging and receiving an excessive attorney's fee for assisting a World War veteran in the preparation and execution of the necessary papers in the presentation to the Veterans' Administration of a claim for disability compensation. He contended that Section 17, *supra*, had repealed the penal provisions of Section 500 of the World War Veterans' Act. The Court said:

"* * * Section 500 of the World War Veterans' Act, as amended (38 U. S. C. A. Sec. 551) was not expressly repealed by said Section 17, but appellant contends that it was repealed by implication. Such repeals are not favored, and will not be held to exist if there be any other reasonable construction. *Ex parte Webb*, 255 U. S. 663, 32 S. Ct. 769, 56 L. ed. 1248; *Cope* v. *Cope*, 137 U. S. 682, 11 S. Ct. 222, 34 L. ed. 832.

Section 17 of Title I of the Economy Act made provision for pension to certain classes of persons who served in the active military or naval service during the World War, and who are permanently disabled as a result of disease or injury incurred in line of duty in such service. 38 U. S. C. A. Par. 701 and 702. It is pointed out that Section 500 (38 U. S. C. A. Sec. 551) was not re-

enacted in the Economy Act of March 20, 1933 (48 Stat. 8). This would indicate that Congress considered it not repealed, but still in full force and effect. * * *"

In the criminal cases of *Lucas and Smith, supra,* the Criminal Division of the Department of Justice asserted that there was no repeal by implication of Section 500 of the World War Veterans' Act, by the language used in Section 17, *supra.* Thus, we have the unusual situation of the same Department of Justice by its civil division now urging the Court to find that there is a repeal by implication of automatic insurance rights arising, if at all, from the same section of law. The language above quoted from the opinion in the *Lucas* case, *supra,* is particularly pertinent. The repeal of the criminal provision, if intended at all, was not by a separate clause independent of other repeals but only as a part of the plan to repeal all laws pertaining to yearly renewable term insurance. If that plan failed by reason of unconstitutionality, its failure is total for there can be no certainty and there is no probability that Congress would repeal some of the laws on the subject independently of the repeal of others. The repealing clause under discussion must be held indivisible and to fail in its entirety.

No one can say that Congress would intend to repeal automatic insurance rights if the repealing clause relative to yearly renewable term insurance was held unconstitutional.

In the case of *Lynch and Wilner* v. *United States,* 78 L. ed. 1484, 292 U. S. 571, Justice Brandeis speaking for the Supreme Court of the United States stated:

"But while the statutes granting gratuities contain no specific provision for suits against the United States, Congress as if to emphasize the contractual obligation assumed by the United States when issuing war risk policies conferred upon beneficiaries substantially the same legal remedy which beneficiaries enjoy under policies issued by private corporations. The consent to sue

has been given originally by Section 405 of the Act of 1917, which, like its substituted Sections applied to *all kinds of insurance* making no specific reference to yearly renewable term policies, obviously Congress did not intend to repeal generally the Section providing for suits." (*italics supplied*)

The Court thereupon concluded that as Section 17 attempted to repeal rights acquired under yearly renewable term insurance it was unconstitutional.

This plaintiff's rights were clearly not repealed by Section 17, *supra*. Under the repealing clause above quoted, which is the only one on which the government can rely, the word "allowance" appears to be the only word which in any manner could be contended to include automatic insurance. We do not think that anyone can successfully contend that "allowances" under the War Risk Insurance Act or the World War Veterans' Act covers automatic insurance.

The War Risk Insurance Act, Public No. 90, 65th Congress, approved October 6, 1917, was divided into articles, Article II referred solely to allotments and family allowances, Article III referred solely to compensation for death and disability and Article IV referred solely to insurance. Automatic insurance is placed under Article IV of the original War Risk Insurance Act which Article referred solely to insurance. There was a definite meaning for "allowance" under the terms of the original War Risk Insurance Act. Article II of this Act specifically related to allotments and family allowances. The allowance made under this Article related to the "allowance" made to a wife or dependent relative while the soldier was in the military service. The War Risk Insurance Act with amendments prior to April 1, 1923, issued by the United States Veterans' Bureau at Washington, D. C., was printed and indexed by the Government Printing Office at Washington. In the index thereof relating to allotment and allowance reference is made only to Section

210 of the War Risk Insurance Act which is embraced in Article II and relates to allotments and family allowances to the enlisted personnel of the War and Navy Departments.

In the index of the World War Veterans' Act of 1924 with amendments prior to June 1, 1929, a pamphlet issued by the United States Veterans' Bureau under the seal of the Bureau and printed by the Government Printing Office at Washington, D. C., in 1929 under "allowance" reference is not made to automatic insurance. The following sections of the World War Veterans' Act, 1924, as amended only are mentioned:

> "Section 23, Section 301, Section 401 (of the World War Veterans' Act, not Section 401 of the War Risk Insurance Act), Section 502, and Section 503."

These allowances cover generally such items as nurse hire for disabled ex-service men or women, emergency medical treatment where the facilities of the Bureau were not available, training pay while the disabled veterans were in vocational training, and travel pay or allowances made to disabled men after rehabilitation and completion of vocational training or pay for their dependents while in training.

On December 31, 1930, the United States Veterans' Bureau caused to be printed in two parts "Regulations and Procedure" under the seal of the Veterans' Bureau and over the signature of the Honorable Frank T. Hines, Director thereof, the regulations and procedure relating to claims in the Veterans' Bureau. No reference is there made to automatic insurance as an "allowance." In the general index of Volume II, page 2327, only the following is indexed under "allowance":

Additional for attendant or nurses . . . . Page 136- 147
Family—Hon. Julian W. Mack, discussion 1241-1273
Maintenance and support — Deductions from, for insurance premiums 198-1981
Procedure, schedules 263-1905-2033 2101-2102-2109-2239 2245
No promise of allowances to be made . . . 1131
Trainees, property 2309-2312-2313

It follows, therefore, that Section 17 contains no language repealing the provisions of Section 401 of the War Risk Insurance Act relating to automatic insurance, even though such a repeal would be constitutional. However, if the language of Section 17 should be held broad enough to cover a repeal of automatic insurance benefits, then such provisions are unconstitutional under the decision of the Supreme Court of the United States in the *Lynch* and *Wilper* cases, *supra,* and under the decisions of this Court of appeals in the *Weaver* case, *supra.* 4th Circuit 86 F (2d) 372.

Furthermore, even if Section 17 of Public No. 2, 73rd Congress repealed automatic insurance benefits Congress could not destroy the right of such benefits which accrued to the respondent covering the period from 1918 down to the time of the repealing clause. *Ettor, et al* v. *City of Tacoma,* 228 U. S. 148, 57 L. ed. 773.

III.

The decision of the Sixth Circuit Court of Appeals in the case of Stephens v. United States, 85 F. (2d) 570, was not grounded upon the proposition that automatic insurance was repealed, but the remarks of the court in that respect were mere dictum.

In the case of *Stephens* v. *United States,* the Sixth Circuit Court of Appeals in a *per curiam* opinion, held:

> "It appearing that this suit was brought by the administrator of the estate of Thomas E. Stephens, who

served in the United States Army from December 18, 1914, to July 25, 1917, to recover automatic insurance for the benefit of his brothers and sisters under Section 401 of the amended War Risk Insurance Act passed October 6, 1917 (40 Stat. 409), as again amended by Section 19 of the Act of June 25, 1918 (40 Stat. 609, 614, 615), but that the statute does not provide for the payment of such automatic insurance benefits to brothers and sisters of a deceased soldier, and it further appearing that such benefits were in the nature of gratuities and that the statute allowing them was repealed by Section 17 of Title 1 of the Act of March 20, 1933, commonly called the Economy Act, ch. 3, 49 Stat. 11, U. S. C. tit. 38, Sec. 717 (38 U. S. C. A. Sec. 717)."

A mere reading of this opinion is sufficient to show that the Court decided the case upon the proposition that the parties plaintiff had no right to these insurance benefits and the last phrase of the opinion was merely dictum as it was not necessary for a decision in that case. It is, therefore, obvious that that Court did not seriously consider the question here involved.

Conclusion.

In view of the foregoing it is respectfully submitted that the action of the Circuit Court of Appeals should be affirmed by this Court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 199.—October Term, 1937.

The United States of America, Petitioner, *vs.* Ben B. Jackson, by his Guardian *ad litem*, Alphene W. Dowell.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 17, 1938.]

Mr. Justice Black delivered the opinion of the Court.

The question is whether the Economy Act[1] repealed Section 401 of the War Risk Insurance Act[2] and thereby deprived veterans and their beneficiaries of "automatic insurance."

In this suit, brought by the son of a soldier who died in service, both the district court[3] and the Court of Appeals[4] were of the opinion that the Economy Act did not terminate the rights of a beneficiary of automatic insurance. We granted certiorari limit-

[1] Sec. 17, Act of March 20, 1933, c. 3, 48 Stat. 11: "All public laws granting medical or hospital treatment, domiciliary care, compensation and *other allowances*, pension, disability allowance, or retirement pay to veterans and the dependents of veterans of . . . the World War, . . . are hereby repealed, and all laws granting or *pertaining to yearly renewable term insurance* are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted. . . ."

[2] Sec. 401 of the War Risk Insurance Act as amended Dec. 24, 1919, c. 16, 41 Stat. 371, 375: " . . . Any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before the expiration of one hundred and twenty days after October 15, 1917, or one hundred and twenty days after entrance into or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each; . . . If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to . . . his child . . . : *Provided, however,* That no more than two hundred and forty of such monthly installments, . . . shall be so paid."

[3] 14 Fed. Supp. 132.

[4] 89 F. (2d) 572.

ing consideration to the question of the repeal of the law providing automatic insurance.[5]

During the World War, it was the policy of the Government to allow soldiers one hundred and twenty days after enlistment or drafting within which to apply for and purchase insurance. For this period, it was intended that they be protected as though they had bought government insurance. In furtherance of this policy, Congress provided that all veterans, who died or became totally and permanently disabled within one hundred and twenty days after their entrance into active service, should be automatically "deemed to have applied for and to have been granted insurance."

It is here contended that the words of the Economy Act repealing "other allowances" and "laws . . . pertaining to yearly renewable term insurance" are broad enough to include a repeal of automatic insurance. With this contention we cannot agree.

Repeals by implication are not favored. A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied.[6]

While the Economy Act explicitly repealed all laws which granted ". . . medical or hospital treatment, domiciliary care, compensation and other allowances, pension, disability allowance, . . . retirement pay . . . and all laws granting or pertaining to yearly renewable term insurance . . . ," Congress did not include "automatic insurance" in this detailed list of benefits repealed.

The words "other allowances" have a well settled meaning. "Allowances" in veterans' legislation, in the Veterans' Bureau and in Army terminology[7] has never been considered synonymous with, or inclusive of, automatic insurance; this word ordinarily refers to extra and special items (in addition to regular compensation) such as nurse hire, training pay, and "travel pay and allowances."[8]

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[5] — U. S. —.

[6] United States *v.* Yuginovich, 256 U. S. 450; United States *v.* Noce, 268 U. S. 613; see, Cope *v.* Cope, 137 U. S. 682.

[7] See, as to meaning of "allowances", Jones *v.* United States, 60 Court of Claims 552, 567; United States *v.* Landers, 92 U. S. 77.

[8] An illustration of the meaning of "allowances" appears in that Section (17) of the Economy Act which is relied upon as the repeal, to wit.: "That, subject to such regulations as the President may prescribe, *allowances may be granted for burial and funeral expenses and transportation of the bodies (including preparation of the bodies) of deceased veterans of any war to the places of burial thereof in a sum not to exceed $107 in any one case.*"

The words "all laws *granting* or *pertaining* to yearly renewable term insurance" refer only to laws which are enactments upon the subject of yearly renewable term insurance. Section 401 did not grant yearly renewable term insurance nor is it an enactment upon that subject. It provided for those soldiers who died in service before they had an opportunity to purchase yearly renewable term insurance or any other type of insurance. This law, therefore, did not pertain to yearly renewable term insurance but to protection for soldiers who never had and never could obtain yearly renewable term insurance.

It is to be remembered that automatic insurance applied to that particular group of American soldiers who either were killed, died, or became wholly or permanently incapacitated before they had a reasonable opportunity to obtain insurance of any kind. It may be that Congress did not believe it proper to economize at the expense of those veterans who came out of the army with health completely destroyed or to the detriment of the beneficiaries of soldiers who lost their lives in service without a reasonable opportunity to apply for insurance.

Certainly the reason which prompted the passage of the express provisions of Section 401 is such that, in the absence of subsequent legislation equally express, they are not overthrown by mere inference or implication.[9] Only clear and unequivocal language would justify a conclusion that benefits, provided by a grateful government because of death and permanent incapacity of its soldiers, are to be wholly withdrawn for reasons of economy. Special provisions benefiting either soldiers who became incurably helpless in the Army or the dependents of soldiers who died or were killed in the service of their country cannot justifiably be repealed by implication.[10] There is no irreconcilable conflict between Section 401 and the Economy Act and effect can reasonably be given to both.[11] The judgment of the Court of Appeals is therefore

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

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[9] Rosencrans *v.* United States, 165 U. S. 257.

[10] Cf. United States *v.* Greathouse, 166 U. S. 601.

[11] Cf. Washington *v.* Miller, 235 U. S. 422, 428; see, also, Posadas *v.* National City Bank, 296 U. S. 503 *et seq.*